88-2028

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In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD R. ELLIS,
Petitioner,

vs.

HENRY L. MUMFORD, and EDWARD CAVANAUGH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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June 12, 1989

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QUESTIONS PRESENTED

1. Whether, in determining a Plaintiff's attorney's fees, a Defendant's solicitation of Plaintiff to make a settlement offer as suggested by Defendant's counsel, creates a "spirit and intent" exception to the *Marek v. Chesney* Rule 68 requirement of a written offer from Defendant to allow judgment be taken against it for a sum certain with costs then accrued.

2. Whether an attorney's fee award under Title 42 U.S.C. § 1988 to a prevailing plaintiff in a single claim civil rights case must be reduced to the amount of damages awarded to the Plaintiff because the monetary value of the relief obtained was less than the reasonable value of the attorney's services in the case.

3. Whether an uncontested, unobjected to and unchallenged lodestar fee application under Title 42 U.S.C. § 1988 can be disregarded by the Lower Court in determining attorney's fees.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Richard R. Ellis, and the Respondents, Henry L. Mumford and Edward Cavanaugh. William Freeman, Jr. was a Defendant in the District Court, but was not a party to the appeal. Since he was not involved in the appeal, he is not named as a party herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, RICHARD R. ELLIS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on January 26, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit has not been reported. It is reprinted on the Appendix hereto, p. A106, *infra.*

The Order of the United States District Court for the Southern District of Florida (Nesbitt, D.J.) has not been reported. It is reprinted in the Appendix hereto, p. A1, *infra.*

The report of the United States Magistrate has not been reported. It is reprinted in the Appendix hereto, p. A6, *infra.*

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the Petitioner brought this suit in the Southern District of Florida. Petitioner prevailed below. On February 29, 1988, the U.S. Magistrate issued its report and recommendation on Petitioner's Motion to Tax Costs and Attorneys' fees. See p. A6, *infra*. On April 29, 1988, the Southern District rejected Petitioner's objections and affirmed the report of the Magistrate. See p. A1, *infra*. On Petitioner's appeal, the Eleventh Circuit on January 26, 1989, affirmed the Southern District's Order. See p. A106, *infra*. Petitioner timely moved for rehearing, which was denied on March 16, 1989. See p. A105, *infra*.

The jurisdiction of this Court to review the Judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorneys' fees.

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the pro-

visions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer,

the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Eleventh Circuit Rule 36-1. Affirmance Without Opinion.

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

STATEMENT OF THE CASE

Petitioner is a photojournalist with Reuters International News Service. In 1986, he instituted this civil rights damage action pursuant to 42 U.S.C. § 1983. The Complaint alleged that two Deputy Sheriffs of Monroe County, Florida, under the negligent supervision of the Sheriff unlawfully restrained and inflicted unwarranted corporal punishment on Petitioner.

Petitioner had been detained in the Monroe County Jail in the early morning hours of May 15, 1984. Petitioner requested of his jailers permission to contact his wife to inform her of his predicament. This was denied. This denial caused Petitioner to more vocally assert his right to contact his wife. In response, Respondents entered his cell to "teach him a lesson about his rights," whereupon they chained and shackled his feet together, cuffed his hands, chained his feet and hands together, and suspended him from his cell door by his chained feet and hands. Respondents left Petitioner thus immobilized for over four hours, ignoring his pleas for relief from the binding restraints and refusing his need to relieve his bodily functions.

After a three-day trial on Petitioner's Complaint, the jury returned its verdict vindicating Petitioner's civil rights and awarding him damages. The jury found the Sheriff equally as culpable as his deputies, but the court directed a verdict for the Sheriff. The court did not reduce the damage award.

The present controversy arose out of Petitioner's § 1988 application for costs, including attorney's fees, as the prevailing party. Petitioner filed his application

detailing the costs and attorney time expended, together with the supporting lodestar affidavit of an independent attorney. Respondents replied, but did not challenge the reasonableness of the attorney's time expended, the reasonableness of the rate requested or the reasonableness of the lodestar fee amount. Neither did Respondents seek an evidentiary review of the fee application. Instead, Respondents raised two legal arguments to the award of attorney's fees to Petitioner as requested.

First, they raised a Rule 68 query. Respondents claimed that certain oral and written communications with Petitioner constituted a Rule 68 Offer of Judgment. At a Pretrial Conference five months before trial, Respondents' counsel orally "advised opposing counsel that I would recommend a settlement for $10,000.00 and perhaps as high as $15,000.00, but certainly no more." Counsel followed up this oral advice with the written reiteration, "I am still willing to recommend settlement for between $10,000.00, and possibly as high as $15,000.00, but absolutely no more." Petitioner did not present any other proof of a Rule 68 Offer of Judgment, nor did he suggest the existence of any other proof.[1]

Second, they argued that Petitioner's lodestar fee should be reduced to $3,500.00 because he recovered only $3,500.00 in damages and had prevailed against only two of the three Defendants on his sole claim.

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1. At this stage of the litigation, Petitioner's unrebutted lodestar fee request alone exceeded $17,000.00. Together with the damages and other costs accrued to that point, the total recovery would have exceeded $21,000.00.

Upon receipt of Respondents' reply, the Court referred the matter to the magistrate under 28 U.S.C. § 636(b) for proposed findings of fact and recommendations. Since there were no disputes of fact, only disputes of law, the magistrate held no hearing on the application and rendered her report based solely on the parties' application and legal memoranda.

The magistrate accepted both of Respondents' legal challenges and added a factual challenge of her own. Three aspects of the Magistrate's report bear emphasis:

1. Citing *Marek v. Chesney,* 473 U.S. 1 (1985), the magistrate accepted Respondents' assertion that a valid offer of judgment had been made based solely on the two solicitations of an offer by defense counsel. Despite the fact that no "offer" was ever tendered by Respondents the magistrate invoked Rule 68 and removed from consideration over sixty-five percent (65%) of Petitioner's attorney time and over sixty percent (60%) of Petitioner's other costs.

2. While no issue of fact existed as to the reasonableness of the attorney time spent or the rate requested, the magistrate on her own initiative cut Petitioner's remaining lodestar fee request in half, from $17,440.00 to $8,720.00 for a total reduction of 82 percent from Petitioner's original fee application.

3. Citing *Hensley v. Eckerhart,* 461 U.S. 424 (1983), the magistrate accepted Respondents' argument to adjust the already reduced lodestar downward to equal the $3,500.00 damage award, stating, "under the circumstances of this case, the remaining two Defendants should not be required to pay Plaintiff's counsel more than the compensation awarded by the jury to the Plaintiff." The

Petitioner's fee request was cut a final 40 percent, from the reduced lodestar fee amount of $8,720.00 to the $3,500.00 attorney's fee award recommended by the magistrate.

Petitioner objected to all three of these recommendations as provided under 28 U.S.C. § 636(b).

The district court rejected Petitioner's objections. The court made no response to Petitioner's Rule 68 objection that defense counsel's mere willingness to recommend a settlement to his client did not constitute an offer from his clients under Rule 68 to have judgment taken against them for a sum certain. Instead, the court construed defense counsel's solicitation of an offer of settlement as a Rule 68 offer of judgment, and held, "the offer of judgment was sufficiently certain and made in open court at a settlement conference so that the spirit and intent of Rule 68 was met."

The court then addressed Petitioner's hourly rate objection. The court did not question the propriety of the magistrate's rejecting the hourly rate requested by Petitioner when the Respondents had not disputed the hourly rate request nor raised the reasonableness of the hourly rate as an issue for review. The court bypassed this necessary predicate and addressed the objection as if the reasonableness of the hourly rate had in fact been challenged by the Respondents. Having assumed its conclusion, the court approved the Magistrate's unilateral halving of the rate request.

On the third objection, the court simply concluded that *Hensley* mandated its determination that the Respondents should not be required to pay more in attorneys' fees under § 1988 than the compensation awarded Petitioner by the jury under § 1983.

Petitioner took appeal to the Eleventh Circuit on all three objections dismissed by the Court. Respondents addressed their Answer Brief solely to the Rule 68 issue. They did not respond to Petitioner's hourly rate issue or its damage award proportionality issue. Instead, they pointed out that Petitioner had a contingent attorney's fee contract, arguing that such contract capped the amount which could be awarded under § 1988. Petitioner advised the Eleventh Circuit that this issue was before this Court in *Blanchard v. Bergeron,* 831 F.2d 563 (5th Cir. 1987), *rev.* and *remanded,* 57 U.S.L.W. 4191 (February 21, 1989).

The Eleventh Circuit elected not to defer its decision pending the outcome of *Blanchard v. Bergeron* and issued a *per curiam* affirmance of the district court without opinion.

REASONS FOR GRANTING THE WRIT

I.

The Eleventh Circuit's Adoption of a "Spirit and Intent" Exception to the Offer of Judgment Doctrine Expands Fed.R.Civ.P. 68 Beyond Its Limits and Conflicts With Decisions of This Court and Other Circuits.

The Eleventh Circuit has sanctioned a material deviation from the accepted requirements of Fed.R.Civ.P. 68. The Eleventh Circuit no longer restricts Rule 68 to offers which allow judgment to be allowed against defendants, as the plain language of the rule requires. By letting stand the district court's "spirit and intent" departure from Rule 68's allowance of judgment foundation, the Eleventh Circuit has upset the balance of the judicial process, putting civil rights plaintiffs in a pre-

dicament that emasculates the power of § 1988. This serious erosion of the settlement benefits of Rule 68 deserves this Court's attention.

The Eleventh Circuit's endorsement of a departure from strict adherence to Rule 68's requirement that defendants' offers allow judgment to be taken against them conflicts directly with this Court's ruling in *Marek v. Chesney*, 473 U.S. 1 (1985). *Marek* held that while an offer under Rule 68 need not itemize the elements of the amounts being tendered under Rule 68, it must allow judgment to be taken against defendants in accordance with the terms of the offer.

> The critical feature of this portion of the Rule is that the offer be one that *allows judgment to be taken against other defendants for both the damages caused by the challenged conduct and the costs then accrued.* [473 U.S. at 6] [emphasis in original].

This "critical feature" identified by the Court fuels the intended beneficial settlement milieu as further noted by the Court:

> The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits. [473 U.S. at 5].

Rule 68 encourages settlement review because failure to do so by either party can result in material consequences whether an offer is accepted or not.

This rationale in *Marek* pinpoints the conflict with the present case. Respondents never made an offer to Petitioner, much less an offer to allow judgment against them. Petitioner never received the "prompt" of a Rule

68 offer. All he received was defense counsel's willingness to recommend a settlement to Respondents. Petitioner had no offer to accept and could not have taken judgment against Respondents on counsel's recommendation even had Petitioner offered to settle with Respondents for the amount defense counsel stated he would recommend.

By thus applying Rule 68 against Petitioner the Eleventh Circuit has removed the cornerstone of Rule 68, the offer. It has replaced the firm offer of judgment by a defendant with the mere solicitation of an Offer from the plaintiff, a solicitation which binds plaintiff, but not defendant. Deviating from the need of an actual offer as the "prompt" for a plaintiff's consideration of Rule 68's risks and benefits creates grave uncertainty and disruption in the litigation process. Plaintiffs will have to scrutinize every statement made in the course of settlement discussions to determine if the "spirit and intent" of Rule 68 has been met by defendants, for fear that a court will later subjectively determine that defendants came close enough.[2]

The proper *quid pro quo* to plaintiffs for assuming the risk of imposition of the Rule 68 sanctions is the equal assumption of risk by defendants that their offer would be binding if accepted. Such mutual risks and rewards give incentive for the careful evaluation of positions by both sides as intended by the drafters of Rule 68. Removing the burden of Rule 68 solely from the defendants destroys the adversarial balance of settlement dis-

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2. This spirit and intent deviation also appears contrary to the strict application of Rule 68 announced by the Fifth Circuit in *Maguire v. Fed. Crop Ins. Corp.*, 181 F.2d 320 (5th Cir. 1950) and the Seventh Circuit in *Grosvenor v. Brienen*, 801 F.2d 944 (7th Cir. 1986).

cussions, while encouraging settlement fishing expeditions by defendants. Heads the defendant wins, tails the plaintiff loses.

This Court, in applying Rule 68 to § 1988, placed great weight in the balanced treatment defendants and plaintiffs receive under the Rule:

> Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs—along with other plaintiffs—who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. [*Marek*, 473 U.S. at 10].

If Rule 68 is no longer neutral, as interpreted by the Eleventh Circuit, the rationale for applying it to civil rights claims—or other claims—loses its credibility. Rule 68 devolves from a beneficial settlement tool for both parties, into a weapon for defendants with which to unfairly leverage plaintiffs. Such leverage in the bargaining position of defendants will perceptibly hamper civil rights plaintiffs' ability to attract legal counsel, particularly in those cases where the monetary value of the claim may be small in relation to the value of vindicating plaintiffs' civil rights. In such instances, the increased risk of application of Rule 68's deterrent penalties without a commensurate increase in benefit will render it impractical to undertake advocacy of civil rights claims. Such application of Rule 68 shifts the emphasis from requiring "plaintiffs to 'think very hard' about whether

continued litigation is worthwhile" [473 U.S. at 11], to requiring plaintiffs to think very hard whether commencing litigation for violations of civil rights is worthwhile.

The spirit and intent doctrine clearly departs from this Court's pronouncement in *Marek* and can find no support in the text of Rule 68. Both of these points were presented to the Eleventh Circuit without serious opposition from Respondents. The Appellate Court wrote no opinion, but had it expressly announced this policy change to the bar by written opinion, such an opinion would have direct and immediate precedential value. Yet the Eleventh Circuit elected to validate the lower court's departure from Rule 68 and *Marek,* without issuing an opinion. It did so citing its own rule, 11th Cir. R. 36-1, which strictly limits the occasion when a *per curiam* affirmance is permitted. None of the requirements of Rule 36-1 could have been met in this case, it appearing that Rule 36-1 was not appropriately applied to this case.

If a written opinion would have precedential value, Rule 36-1 prohibits an affirmance without opinion. It does so to prevent the unequal application of law to individual cases and to ensure that the members of the bar and the public have notice of policy changes from accepted standards of law.

At bar, however, Rule 36-1 has had the opposite effect. It keeps from the bar and public the change in policy under Rule 68 announced by the district court, which new policy waits as a trap for unsuspecting plaintiffs. Given that Respondents' counsel represents law enforcement officers throughout the State of Florida, such

unannounced rule change can have wide and deleterious impact on civil rights plaintiffs.

The Eleventh Circuit's affirmance without opinion further raises the concern that Rule 36-1 can be employed to foreclose meritorious defenses on an individual case-by-case basis. It permits a court to establish contrary policy without the scrutiny that written statements of that policy would engender. Civil rights claims are particularly susceptible to such silent adjudication, especially those claims with lower monetary damage awards. The Eleventh Circuit decision by its silent attack on § 1988 attorney's fees has established contrary policy, which policy discourages the bringing of such suits contrary to the express intent of Congress.

In this instance, the absence of an opinion has a more invidious impact than an opinion could have had. By the use of Rule 36-1 the court has silently implemented a material revision of Rule 68 directly contrary to this Court's decisions. Such substantial shift in application of Rule 68 merits the scrutiny of this Court.

II.

The Eleventh Circuit's Limitation of Attorney's Fees Allowed Under 42 U.S.C. § 1988 to the Monetary Damage Awarded to a Prevailing Plaintiff on His 42 U.S.C. § 1983 Claim Conflicts With the Decisions of This Court.

The Eleventh Circuit has here endorsed an application of the lower court which limited Petitioner's § 1988 fee award to the amount of damages recovered by Petitioner in his underlying civil rights action, based not upon what was a reasonable attorney's fee, but upon

the unbridled discretion of the court in deciding what amount the defendants should not be required to pay more than:

> ["U]nder the circumstances of this case" the two Defendants against whom the Plaintiff prevailed should not be required to pay more than the compensation awarded by the jury to the Plaintiff. (p. A4, *infra*).

Such an explicit pronouncement of a proportionality rule for § 1988 fee awards conflicts with this court's ruling in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), and *Blanchard v. Bergeron*, 57 U.S.L.W. 4191 (February 21, 1989).

While upholding the validity of § 1988 fee awards which exceed the amount of damages recovered, *City of Riverside* succinctly rejected the validity of limiting fee awards by the amount of damages recovered:

> A rule of proportionality would make it difficult, if not impossible, for individuals of meritorious civil rights claims but relatively small potential damages to seek redress from the courts. This is totally inconsistent with Congress' purpose of enacting § 1988. [477 U.S. at 578].

Like *City of Riverside*, this case involved individual police misconduct. The Petitioner did not recover substantial monetary relief as a whole but he did vindicate his civil rights. More appropriately, the size of the damage award relative to the individual deputy sheriffs who have to pay it probably had a significant deterrent effect on them and the sheriff's department. The lower court failed to acknowledge the civil rights benefits of the claim, treating the fee request as a private tort suit. Not one consideration is given to Petitioner's vindication of his civil rights, the focus being solely on the amount

of the damage award. Such myopic review was rejected in *City of Riverside*:

> As an initial matter, we reject the notion that a civil rights action for damages contributes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. [477 U.S. at 574].

The lower court's review does more than simply violate these necessary precepts of a § 1988 fee review. It violates these policies in such a deliberate and methodical manner to suggest that civil rights § 1988 fee awards are not encouraged. For illustration, the lower court applied the same factor, the $3,500.00 monetary award, to rationalize its three reductions of Petitioner's fee request. First, as argued under point I, it manufactured a Rule 68 exception to reduce the reasonable attorney hours by 65%. Secondly, it manufactured a dispute of fact to cut the uncontested hourly rate by one-half based primarily on the size of the damage award. Thirdly, it applied a damage award proportionality rule to adjust the lodestar downward to exactly equal the size of the damage award. This triple whammy sends a clear message to civil rights litigants; don't bring civil rights actions with small monetary damage claims and expect to recover a reasonable attorney's fee.

This singular focus on size of damage awards was admonished by this Court in *Blanchard*. While there the court's attention was directed to an issue of contingent fee limitations, its rationale directly addresses this issue at law:

> If a contingent fee agreement were to govern as a strict limitation on the award of attorneys' fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation. The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief. [57 U.S.L.W. at 4193].

The Eleventh Circuit has strongly ruled contrary to this Court's decision by endorsing just such an "undesirable emphasis". The Eleventh Circuit rejected the *City of Riverside* arguments raised by Petitioner to which Respondents had made no defense and directed no argument. Respondents relied solely on the Fifth Circuit's decision in *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987), *rev.* and *remanded*, 57 U.S.L.W. 4191 (February 21, 1989) to defend the lower court's fee award. Since the Eleventh Circuit decided this issue without the benefit of this Court's subsequent opinion in *Blanchard*, and since its opinion further validates the undesirable emphasis on damage awards in civil rights actions, consideration of this case by this Court is essential to insure uniformity with the Court's decisions.

III.

The Decision Below That Uncontested Lodestar Attorney's Fee Requests Under 42 U.S.C. § 1988 May Be Disregarded Raises Important Unresolved Problems and Conflicts With the Decision of Another Circuit.

The Eleventh Circuit has determined that it is valid for a lower court to manufacture issues of fact not

raised or disputed by the defendants, and then to rule against the plaintiff for reasons not argued by defendants, thereby depriving the plaintiff of the opportunity to defend itself against the court action.

Petitioner filed independent, uncontradicted, sworn affidavits attesting to the reasonableness of the hourly rate requested and hours reasonably expended. Respondents did not challenge the sworn fee affidavits, did not seek an evidentiary hearing and did not file counteraffidavits (neither did Respondents challenge nor respond to this issue before the Eleventh Circuit). Nonetheless, the lower court rejected Petitioner's affidavits and replaced the uncontested facts and evidence with "facts" of its own making.

This act of judicial intervention raises a significant question of whether our adversarial system applies to § 1988 fee awards or whether courts have plenary power to venture beyond the issues as presented by the adverse parties. The Eleventh Circuit has validated the latter position, while the Third Circuit has adopted the former. *Cunningham v. City of McKeesport*, 753 F.2d 262 (3rd Cir. 1985), *vacated*, 478 U.S. 1015 (1986), *reinstated*, 807 F.2d 49 (3rd Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987). The Third Circuit statutory fee case fits squarely within the traditional function of courts in the adversarial process:

> We considered it inappropriate for a district court in an adversarial system to reject uncontradicted sworn affidavits because of reasons not raised by opposing counsel and on the basis of facts "of which the trial court has no personal knowledge." [807 F.2d at 53].

This question of a court's responsibility to the adversarial system has not been resolved by this Court. *Hensley v. Eckerhart,* 461 U.S. 424, does not answer the question, but does acknowledge a district court's discretion in determining the amount of the fee award, stating "this is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." 461 U.S. at 437. While this rationale works well with disputed factual matters, it suggests the contrary result where there are undisputed factual matters. Rather than avoiding review of factual matters, a court's rejection of undisputed factual matters generates new disputes where none existed. *Hensley* appears to confirm Petitioner's position that such manufacture of disputes by the district court is contrary to the proper role of courts in § 1988 determinations.

> A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee. [461 U.S. at 437].

Logically this ideal of settlement would apply equally to encourage the settlement of portions of the fee request which are not in dispute. The district court remains free to exercise its discretion in those areas not agreed to, thus shortening the litigation process to disputed issues only.

Not only should district courts be encouraged for reasons of time conservation to limit the fee application process to disputed issues, but such policy would address a real inequity created when courts deviate from accepted adversarial review. This inequity created by a

court's manufacture of factual issues is well illustrated in *Cunningham*:

> The fee applicant would have been entitled to offer evidence in support of the reasonableness of her request had the defendants put in issue either the fact that certain time had been spent, or the necessity for doing so. *In Re: Fine Paper*, 751 F. 2d at 583-584. No such opportunity was afforded her because the defendants filed no opposing affidavits and sought no evidentiary hearing. [753 F.2d at 267].

Query how a fee applicant can defend himself when the challenge comes not from the defendants, but from the court without a hearing, particularly when the court's challenge first appears in its Order contrary to the plaintiffs' theretofore unchallenged position. Such an uncontestable challenge from the court calls into serious question the neutrality of the court system and creates the appearance of unequal treatment of the parties.

Given the serious consequences engendered by a policy permitting review of disputes not raised by the parties, lower courts need clear direction as to the limits of their discretion in determining statutory fee applications where the basic elements of the application are not at issue.

CONCLUSION

For the reasons elicited above, this Petition for Certiorari should be granted. Each issue raised by itself would merit review. When, however, each is viewed as part of a whole, the whole raises important issues of its own without respect to treatment of civil claims which merits plenary review of all issues by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PHILLIP C. GILDAN, a member of the Bar of this Court, hereby certify that on this 12th day of June, 1989, three (3) copies of the Petition for Writ of Certiorari in the above entitled case were mailed to JULIUS PARKER, JR., ESQUIRE, of the Law Firm of HABEN, PARKER, SKELDING, COSTIGAN, McVOY & LABASKY, Attorney for all Respondents herein, Post Office Box 669, 318 North Monroe Street, Tallahassee, Florida 32302. I further certify that all parties required to be served have been served.

PHILLIP C. GILDAN
Attorney

APPENDIX

(Filed May 3, 1989)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-CIV-NESBITT

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD,
and EDWARD CAVANAUGH,
Defendants.

ORDER ON ATTORNEY'S FEES

This matter is before the Court upon an appeal from an order of the Magistrate awarding counsel for Plaintiff who recovered $3,500.00 after a jury trial the amount of $3,500.00 in attorneys fees and costs of $534.17. The amounts requested by counsel for the Plaintiff were $50,000.00 for attorneys fees, and costs in the amount of $11,004.97.

The Plaintiff's objections to the Magistrate's report fall into the following categories:

1. It was improper to recommend an hourly fee of $100.00 as Plaintiff submitted an affidavit of an attorney

which set forth the amount of $200.00 an hour as reasonable in a case of the nature before the Court.

2. Some 165 hours expended by counsel for the Plaintiff were improperly excluded from the Magistrate's calculations.

3. The amount awarded was based on an erroneous assumption that Plaintiff's counsel should not be awarded more in fees that the compensation awarded by the jury to the Plaintiff.

4. The Magistrate improperly disallowed reimbursement for certain costs incurred by Plaintiff such as travel expenses from Hong Kong (where Plaintiff now resides) to the United States for taking of his deposition.

Upon a review of the record, and being otherwise duly advised as a result of having presided over the trial of this matter, the Court enters the following order affirming the report and recommendation of the Magistrate as in accordance with the dictate of *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974) and *Norman v. Housing Authority of the City of Montgomery*, 2 F.L.W. Fed. C24 (11th Cir. Feb. 1, 1988).

A predicate for the Magistrate's determination of reasonable fees was the fact that an offer of judgment in the total amount of $10,000.00 to $5,000.00 timely made prior to trial pursuant to Fed.R.Civ.P. 68 in February 1987 which was refused. Counsel for the Plaintiff disagrees that an "offer of judgment" was made as it was not in writing and "served" upon the Plaintiff. There is no dispute that counsel for the defendant offered to settle the case for $10,000 to $15,000 at a pretrial settlement conference before the Magistrate and by a letter to counsel for the Plaintiff on February 3, 1987.

The offer of judgment was sufficiently certain and made in open court at a settlement conference so that the spirit and intent of Rule 68 was met. In any event, Plaintiff's counsel flatly refused the offer and counter-offered the amount of $45,000, including attorney's fees. Therefore it was proper for the Magistrate not to consider any costs incurred after the making of the offer in accordance with the "penalty" provisions of rejecting an offer of judgment pursuant to Rule 68.

As to the objection to the hourly rate recommended, one of the factors in determining a reasonable hourly rate is an evaluation of the level of an attorney's legal skill. As was stated in *Norman*:

> Legal skill is a several faceted concept and there is no assurance that a level of attainment in one facet means that the practitioner will or has similarly attained in all facts. Legal skill may be a function of experience, but that is not always the case. Further, legal skill has no intrinsic value unless it is used to further the client's interest, which is to obtain a just result quickly and economically.
>
> At the beginning of a case skill is manifest in the kind of judgment shown in case assessment. This is evidenced by efforts where feasible to seek dispute resolution without litigation, or, if litigation appears necessary, by the decisions on theories to be included and parties to be sued.

Norman, 2 F.L.W. Fed. at C27. Counsel for the Plaintiff demonstrated little skill in negotiation as he approached a resolution of the case as a "hard-liner" which is an outdated "trench warfare" view of the role of settlement in modern-day litigation.

The Magistrate properly considered the applicable case law in determining as a basis for an objective estimate of the value of the attorney's services.

First it is necessary to determine a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Norman*, 2 F.L.W. Fed. C2.

Contrary to the Plaintiff's position that as his expert affidavit setting forth $200.00 an hour was the "only information of record with regard to the hourly rate to be used in calculating (the) lodestar rate," there is no requirement that such an affidavit must be accepted. The affidavit of Plaintiff's expert is relevant, under *Johnson*, but not determinative under the lodestar approach. Other than the affidavit, there was nothing presented to, nor did the Magistrate have knowledge or assurance of Plaintiff's expert attested to a rate which was charged in similar cases for similar clients by lawyers of similar skill, experience and reputation in the community. It was not improper for the Magistrate to determine based on this record that $100.00 was a reasonable hourly rate.

There is no basis to conclude that the Magistrate felt bound to limit the Plaintiff to no more compensation than the compensation awarded by the jury to the Plaintiff. The Magistrate properly considered the results obtained in light of *Hensley* as to whether there should be an upward and downward adjustment of the fee and concluded "under the circumstances of this case" the two Defendants against whom the Plaintiff prevailed should not be required to pay more than the compensation awarded by the jury to the Plaintiff.

Finally, the Magistrate properly found on the basis of the record that Plaintiff did not travel from Hong Kong

to the United States solely for the purpose of giving his deposition in this case, and properly disallowed those travel expenses. (See letters from Plaintiff dated August 15, 1986 attached to Plaintiff's reply to motion.) In all other respects the Magistrate's award of costs was proper.

After due consideration and being fully advised in the premises, it is

ORDERED AND ADJUDGED that the report and recommendation of the Magistrate is ratified and approved. The Plaintiff is awarded attorney's fees in the amount of $3,500.00, and costs of $534.17.

DONE AND ORDERED at Miami, Dade County, Florida this 29th day of April 1988.

/s/ Lenore C. Nesbitt
Lenore C. Nesbitt
U.S. District Judge

cc: Kevan K. Boyles, Esq.
Julius F. Parker, Jr., Esq.
Magistrate Charlene Sorrentino

D.042588.o

(Filed February 29, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-Civ-NESBITT

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD, EDWARD CAVANAUGH,
Defendant.

REPORT OF UNITED STATES MAGISTRATE

This is a civil rights suit in which the plaintiff recovered $3,500.00 from the defendants after jury trial but now seeks attorney's fees in the sum of $50,000.00 and costs of $11,004.97.

Fees are sought in this case pursuant to 42 U.S.C. §1988. The plaintiff is a prevailing party within the meaning of §1988 as to two of the three defendants in the case. Costs are to be assessed pursuant to *Fed.R.Civ.P.* 54(d) and 28 U.S.C. §1920.

The complaint was filed on May 4, 1986, seeking both compensatory and punitive damages. An offer of settlement by the defendants in the range of $10-15,000.00 was turned down by counsel for the plaintiff at a formal pretrial-settlement conference before the undersigned on

January 16, 1987. The undersigned reviewed the facts revealed by extensive discovery at the time of the conference and urged plaintiff's counsel to accept what in her view was a more than fair settlement offer. An affidavit by defense counsel with supporting exhibits reveals that settlement in the amount of $10-15,000.00 was again offered to plaintiff's counsel on February 3, 1987. The offer was refused.

On May 14, 1987, plaintiff's counsel wrote a letter to defense counsel offering to settle the case for $45,000.00. The letter noted, in part, that even if the case were worth only $10-15,000.00, as ". . . you and Magistrate Sorrentino believe it to be . . ." counsel would, after such a verdict, request attorney's fees which ". . . would easily match that amount and probably exceed the same." This offer was refused by the defendants.

The case proceeded through a three day jury trial which resulted in a verdict for the plaintiff of $3,500.00 in compensation damages and no punitive damages.

Counsel for the plaintiff has filed an extensive, itemized personal affidavit in support of his claim for $11,004.97 in costs, and of his claims for attorney's fees for 252.2 hours of professional services. The supporting affidavit of a separate lawyer suggests that fees in the amount of $200.00 per hour, or a total sum of $50,000.00 is appropriate in this case.

The defendants vigorously oppose this motion for fees and costs, and plaintiff's counsel has replied to the opposing response to his motion.

Plaintiff's counsel now seems to argue that if he had accepted the settlement offer of the defendants of from $10-15,000, that he would have been entitled to an addi-

tional large sum for attorney's fees, whereas his own offer of $45,000.00 included fees. He is, in other words, claiming that he actually offered to settle for essentially the same amount as the defendants. This, however, is specious. The offer made at the settlement conference was for a *total* sum of $10-15,000.00. Defense counsel made it quite clear that he would absolutely not recommend payment of more, and that this offer was only for what in his opinion was the nuisance value of the case. He did not offer to settle for $10-15,000.00, plus attorney's fees, plus all other costs. In fact, in his written offer dated February 3, 1987, he offers the sum of $10,000.00 "and possibly as high as $15,000.00, but absolutely no more."

The offer of judgment was not defective under *Fed. R.Civ.P.* 68 for failure to specifically include an amount for attorney's fees. *Lyons v. Cunningham*, 583 F.Supp. 1147, 1158-59 (S.D.N.Y. 1983).

The simple fact is that plaintiff's counsel at all times of record after the date of the settlement conference flatly rejected an entirely reasonable offer of settlement in this case.

The defendants rely upon *Hensley v. Eckerhart*, 461 U.S. 424 (1983) for the proposition that a court should award only that amount of fees which is reasonable in relation to the results obtained. They further point to *March v. Chesney*, 473 U.S. 1 (1985) for the proposition that once an offer for judgment is made in accordance with the terms of *Fed.R.Civ.P* 68, and rejected, no costs, including attorney's fees, may be awarded for expenses incurred and time spent after the offer of judgment.

Plaintiff's counsel responds that no offer of judgment was ever *filed* in the case. Rule 68, however, does not

require that such an offer be filed. In fact, in express terms it contemplates filing of the offer only if it is accompanied by a notice of acceptance.

Review of the entire record of this case indicates that fees and costs incurred subsequent to February 3, 1987, should not be awarded under *Fed.R.Civ.P.* 68 and *Marek v. Chesny, supra.* Actually, the offer of judgment was made at the pretrial settlement conference held in open Court on January 16, 1987; but under the circumstances of this case it is only fair to allow plaintiff's counsel a reasonable time thereafter to consider the offer. As of February 3, 1987, however, the offer was again made, in writing, and was rejected.

The plaintiff, as a partially prevailing party, is entitled to an award of reasonable fees and costs incurred in this case.

For purposes of determining the lodestar, or reasonable fee contemplated by §1988, the Court should determine the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart, supra* at 433; *Riverside v. Rivera,* 477 U.S. 561 (1986). Hours not reasonably expended should be excluded from this initial calculation. *Hensley, supra* at 434. Under the circumstances of this case, the hours and costs expended subsequent to February 3, 1987, should be excluded from the lodestar.

The accounting of hours expended in this case is sufficiently detailed. Prior to February 3, 1987, counsel expended 87.2 hours in preparation of the case.

Both the Supreme Court and the Eleventh Circuit Court of Appeals have held that calculation of the lodestar includes consideration of twelve factors derived from

the ABA Code of Professional Responsibility DR 2-106 (1980) and adopted in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5 Cir. 1974), with additional consideration of the results obtained and, if appropriate, an enhancement for contingency. *Norman v. Housing Authority of City of Montgomery*, ... F.2d ..... (11 Cir. No. 87-7763 Feb. 1, 1988).

For the reasons to be discussed below, it is recommended that an hourly fee of $100.00 is appropriate, so that the lodestar figure in this case is $8,720.00.

Although the twelve factors are considered in making the initial lodestar determination, the Eleventh Circuit cases, including the most recent slip opinion in this area, *Norman v. Housing Authority, etc., supra*, also stress consideration of these factors in the Court's determination of whether the lodestar figure should be adjusted upward or downward.

The factors specified in *Johnson v. Georgia Highway Express, Inc, supra* at 717-719, are as follow:

1. The time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the legal service properly.
4. The preclusion of employment by the attorney due to acceptance of the case.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time limitations imposed by the client or the circumstances.
8. The amount involved and the results obtained.

9. The experience, reputation, and ability of the attorneys.
10. The "undesirability" of the case.
11. The nature and length of the professional relationship with the client.
12. Awards in similar cases.

The Eleventh Circuit requires findings of fact with regard to each of these twelve factors. *Odum v. Clark*, 748 F.2d 1538 (11 Cir. 1984), and cases cited therein.

The time and labor required has been considered, it already having been stated that the hours specified by counsel are reasonable. There were no novel or difficult issues in this case, which therefore required no special skill other than that of a proficient attorney and should not have precluded other employment by counsel.

The only information of record regarding the fifth factor is the affidavit of Moses Baker, Jr., Esquire, who asserts that he, as a member of the general, but not the trial bar of this Court, is familiar with §1983 litigation, having recently tried a state case resulting in a substantial jury verdict, and believes that $200.00 per hour is a reasonable fee in a case of this nature. The burden of substantiating an attorney's fee is on counsel seeking the fee. *Johnson v. University College*, 706 F.2d 1205 (11 Cir. 1983). Reasonable fees are calculated according to prevailing market rates in the relevant community. *Blum, Commissioner, New York State Dept. of Social Services v. Stenson*, 465 U.S. 886 (1984). In the absence of more substantiation concerning counsel's prior experience and the current rates charged by counsel of similar experience in this community, an hourly fee of $100.00 is appropriate in this case, based upon counsel's skill and experience as demonstrated before this Court.

The fee in this case was contingent, as evidenced by a copy of the agreement between counsel and his client. Under the circumstances of this case, however, there is no reason to enhance the fee because of this factor.

No particular time limitations were imposed by the client or the circumstances of this case. The amount involved and results obtained in this case were negligible. The experience, reputation, and ability of counsel has been briefed by neither side and is not a crucial factor in this case. The case was not undesirable, as that factor is discussed in *Johnson*, because it had no community or professional ramifications upon counsel or his practice. The Court has not been made aware of any particular factors concerning the nature and length of the professional relationship of counsel with his client which could affect the fee determination. Counsel have not briefed fee awards in similar cases.

In short, of all the factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, only the contingent nature of the fee arrangement in this case militates toward a higher fee. All others suggest moderate compensation.

There remains the question stressed by *Hensley*, as to whether the results obtained suggest an upward or downward adjustment of the fee. The Eleventh Circuit has held that under the Civil Rights Attorney's Fees Award Act, a District Court should award only that amount of fees which is reasonable in relation to the results obtained. *Foster v. Board of School Commissioners of Mobile County, Alabama*, 810 F.2d 1021 (11 Civ. 1987).

This is a case in which the plaintiff prevailed as to only two of the three defendants. Moreover, punitive damages far in excess of the claimed compensatory dam-

ages were sought, but the jury awarded no punitive damages. The plaintiff has therefore not prevailed in full either as to parties or claims. Further, this case was utterly blown out of proportion by overzealous counsel. The jury verdict was neither unforseeable nor unreasonable upon the facts of the case. Further, there was no evidence whatever to support the claims against the prevailing defendant. Under the circumstances of this case the remaining two defendants should not be required to pay plaintiff's counsel more than the compensation awarded by the jury to the plaintiff. It is therefore recommended that an attorney's fee in the amount of $3,500.00 be awarded.

There appear to be no circumstances requiring an apportionment of the fee among the two defendants other than equally. *See*: Counsel for *Periodical Distributors Associations v. Evans*, 827 F.2d 1483 (11 Civ. 1987).

The plaintiff has also requested costs in the sum of $6,859.91 incurred prior to February 3, 1987. Of the itemized costs, the defendants specifically object to a lump sum of $1,246.24 claimed for "preliminary investigative services" of Dillon-Kluth Corporation, and $4,550.00 incurred by the plaintiff in travel expenses from Hong Kong and lost wages incurred in connection with a deposition cancelled less than 24 hours prior to its scheduled time.

The plaintiff has filed no itemization of the services performed by Dillon-Kluth Corporation, and, more importantly, has stated no basis for the recovery of such expenses as costs. Such investigative expenses are not properly taxable as costs. *Hope Basket Co. v. Product Advancement Corp.*,. 104 F.Supp. 444 (W.D. Mich. 1952).

The plaintiff also seeks $4,550.00 in connection with the cancelled deposition. This includes $2,200.00 in air

fare, $650.00 in hotel expense, $400.00 for food, $500.00 for a rental car, $100.00 for gasoline, and $700.00 for one week's lost wages. The amounts requested are inordinately high for the items specified. More importantly, absent exceptional circumstances, travel expenses relating to depositions are not taxable as costs. *Dr. Robert v. Gannett Co.*, 558 F.Supp. 1223 (D. Hawaii 1983).

Although the necessity of travel from Hong Kong and the short notice of cancellation might ordinarily justify compensation for reasonable expenses, in this case the letter from plaintiff's counsel to defense counsel, dated August 15, 1986, (attached as Exhibit A to the plaintiff's reply to this motion) simply informed counsel that the plaintiff would be available for deposition during a specified two-week period, and needed to know if a deposition was to be scheduled so that appropriate travel plans could be made. The letter did not indicate that the plaintiff would travel to the United States solely for the purpose of giving his deposition, and a reasonable interpretation, as argued by the defendants, is that the plaintiff was to be stateside on unrelated business during the specified period but would make himself available for deposition if requested.

The plaintiff also seeks travel expenses of $529.50 incurred by counsel in taking a deposition in South Carolina. Travel expenses of counsel for the taking of a deposition are not taxable as costs. *City Bank of Honolulu v. Rivera Davila*, 438 F.2d 1367 (1 Cir. 1971).

It is therefore recommended that the items of $1,246.24 for investigative fees, $4,550.00 for deposition travel expenses and lost wages of the plaintiff, and $529.50 deposition travel expenses of plaintiff's counsel be disallowed as costs. The remaining costs incurred prior to February 3,

1987 are in the sum of $534.17, which is properly taxable as costs.

For these reasons it is the recommendation of the Magistrate that the plaintiff be awarded an attorney's fee in the amount of $3,500.00, and costs of $534.17.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: February 29, 1988

/s/ Charlene H. Sorrentino
United States Magistrate

cc: Julius Parker, Jr., Esq.
Kevan K. Boyles, Esq.

(Filed March 9, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-Civ-NESBITT
FLORIDA BAR NO. 285854

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREMMAN, JR., HENRY L. MUMFORD and EDWARD CAVANAUGH,
Defendants.

OBJECTIONS TO REPORT OF UNITED STATES MAGISTRATE

COMES NOW the Plaintiff, by and through his undersigned attorneys, and hereby files this his Objections to the Report of the United States Magistrate dated February 29, 1988 and in support thereof states as follows:

1. The Magistrate has concluded that the Defendants in this action made an Offer of Judgment pursuant to *Fed.R.Civ.P.* 68. This "Offer of Judgment" was supposedly made at the formal pretrial settlement conference before the Magistrate on January 16, 1987 and reiterated in a letter to the undersigned attorney on February 3, 1987. The operative language which the Magistrate has deemed to be an "Offer of Judgment" within the purview of *Fed.R.Civ.P.* 68 and which is set forth on page 1 of the Defendants' Attorney's Affidavit attached to the Defen-

dants' Memorandum in Opposition to Motion to Tax Costs and Attorney's Fees and again set forth in the letter dated February 3, 1987, attached as Exhibit "B" to the aforementioned Memorandum is as follows:

> "I would *recommend* a settlement for $10,000.00 and perhaps as high as $15,000.00, but certainly no more." (emphasis supplied).

The Magistrate has concluded that this language creates an Offer of Judgment pursuant to *Fed.R.Civ.P.* 68 and thus, the Plaintiff is precluded from recovering costs and attorney's fees incurred subsequent to the date of the supposed "Offer of Judgment", to wit: February 3, 1987. The Plaintiff disagrees with this conclusion and thus, this Court is confronted with the issue as to whether the words "I would recommend a settlement for $10,000.00 and perhaps as high as $15,000.00, but certainly no more" gives rise to an Offer of Judgment pursuant to *Fed.R.Civ.P.* 68.

The operative portion of *Fed.R.Civ.P.* 68, entitled "Offer of Judgment reads as follows:

> ". . . a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued."

The above-referenced language used by Defendants' counsel both at the formal pretrial settlement conference and in his letter to the undersigned attorney on February 3, 1987 *does not* give rise to an Offer of Judgment pursuant to *Fed.R.Civ.P.* 68 for the following reasons:

(A) It must be in the form of a pleading and served on the adverse party pursuant to *Fed.R.Civ.P.* 5.

Tansey v. Transcontinental & Western Air, D.C. D.C. 1949, 97 F. Supp. 458; *Nabors v. Texas Co.,* D.C.La.1940, 32 F.Supp. 91.

(B) The offer must specify a *definite sum* for which judgment may be entered. *Tansey v. Transcontinental & Western Air,* D.C.D.C.1949, 97 F.Supp. 458. (emphasis added).

(C) It must be *unconditional* and include "costs then accrued." *U.S. v. Mortensen,* D.C.Neb.1951, 11 F.R.D. 516. (emphasis added).

Based upon the foregoing, the operative language does *not* give rise to an Offer of Judgment pursuant to *Fed.R. Civ.P.* 68. It was not made in the form of a pleading with said pleading being served pursuant to *Fed.R.Civ.P.* 5. There is no offer to allow judgment to be taken against the Defendants for the money or property specified in the offer. There is no definite sum for which judgment could be entered and the same is obviously conditioned upon receiving approval from his client to make this "Offer". Furthermore, this language does not even amount to an informal, inadmissible offer to settle the case because the same is conditional and is not for a sum certain.

Having concluded that Defendants' counsel made an "Offer of Judgment" pursuant to *Fed.R.Civ.P.* 68, the Magistrate excluded the 165 hours of attorney time which occurred after February 3, 1987 from her computation of the lodestar figure. It is this erroneous conclusion upon which the Plaintiff objects.

2. The Magistrate recommends that an hourly fee of $100.00 per hour is appropriate in calculating the lodestar amount although the only information of record with regard to the hourly rate to be used in calculating said

lodestar amount is that of $200.00 per hour as set forth in the Affidavit of Moses Baker, Jr., Esq. (Here it should be noted that the Defendants have not presented any information as to what the hourly rate should be in calculating the lodestar figure.)

In disregarding attorney Baker's Affidavit, the Magistrate distinguished Mr. Baker's opinion of a $200.00 per hour rate which was based on the fact that he believed the same to be a reasonable basis for a fee in a case of this nature, and cited *Blum, Commissioner, New York State Department of Social Services v. Stenson,* 465 U.S. 886 (1984), for the proposition that reasonable fees are calculated according to the prevailing market rates in the relevant community. The Magistrate went on to state "that in the absence of more substantiation concerning counsel's prior experience and the current rates charged by counsel of similar experience in this community, an hourly fee of $100.00 is appropriate." Plaintiff has therefore attached to these Objections and marked Exhibit "A", a Supplemental Affidavit of Attorney Baker that speaks to the prevailing market rate in the relevant legal community for similar services and reputation as that of the undersigned attorney. In addition, Attorney Baker provides information to the Court as to rates actually *billed, awarded* and *paid* to lawyers with similar skill, reputation and experience as the Plaintiff's lawyer in similar lawsuits in the geographical area encompassed for the Federal District Court for the Southern District of Florida as required by *Norman v. Housing Authority of the City of Montgomery,* 836 F.2d 1292 (11 Cir. 1988). Also, the undersigned attorney has attached hereto and marked Exhibit "B", his Supplemental Affidavit concerning his prior experience in support of his request for attorney's fees in the amount of $200.00 per hour.

3. Based upon the foregoing, the Plaintiff therefore takes exception to the lodestar figure of $8,720.00 as calculated by the Magistrate in this case on the basis that:

(A) At least 165 hours were improperly excluded from the Magistrate's calculation because of the erroneous conclusion as to the "Offer of Judgment", pursuant to *Fed.R.Civ. P.* 68 and thus 270.7 hours should have been used; and

(B) The Magistrate's use of $100.00 per hour as an appropriate hourly fee in that the same has no relation to the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation in light of the Supplemental Affidavits provided by Attorney Baker and the undersigned attorney.

Thus, the appropriate lodestar figure that should be used in this case is $54,140.00. (The lodestar figure has been adjusted to reflect the additional time expended in preparing these Objections. See Supplemental Affidavit, attached hereto and marked Exhibit "B".

4. Plaintiff further objects to the Magistrate's conclusion and recommendation that the Defendants should not be required to pay Plaintiff's counsel more than the compensation awarded by the jury to the Plaintiff, to wit: $3,500.00. In so doing, the Magistrate cited the case of *Foster v. Board of School Commissioners of Mobile County, Alabama,* 810 F.2d 1021 (11 Cir. 1987) for the proposition that under the Civil Rights Attorney's Fees Award Act, a District Court should award only that amount of fees which is reasonable in relation to the results obtained and reasoned that because the jury only awarded $3,500.00 in

damages and attorney's fees should not be more than the compensation awarded by the jury to the Plaintiff. This conclusion is erroneous as this rule of law was used by the Magistrate after having taken a partial quotation out of context from the *Foster* case.

In addition to the above, the partial rule of law used was inappropriately cited by the Magistrate as being derived from the *Foster* case, however, the same was part of a citation by the *Foster* Court to the Supreme Court case of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) which stated in full as follows:

> "Where a plaintiff achieved only limited success on related *claims*, however, the District Court should award only the amount of fees that is reasonable in relation to the results obtained." Id., at 436, 103 S.Ct. at 941, 76 L.Ed. 7 at 51-52. (emphasis supplied).

After reviewing the entire quotation as used by the *Foster* Court and a complete reading of the *Hensley* case, it is apparent that the Supreme Court was referring to the various *claims for relief* brought by the prevailing party and not the amount of monetary damages awarded and thus, the cases are clearly distinguishable. In fact, the Supreme Court in the case of *City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986 expressly rejected the contention that the award of attorney's fees under Section 1988 must be proportionate to the amount of damages recovered. In the *City of Riverside* case, the plaintiffs were awarded $33,350.00 in compensatory and punitive damages; $13,300.00 on their Federal claims and $20,050.00 for their state law claims. The District Court awarded attorney's fees in the amount of $245,456.25 and the Supreme Court affirmed the award and concluded that the same was awarded in accordance with the criteria set out

in *Hensley*, supra. In so doing, the Court expressly rejected the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated and stated:

> "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053-1055, 55 L.Ed.2d 252 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in Section 1988, over and above the value of a civil rights remedy to a particular plaintiff . . ." Hensley, 461 U.S., at 444, n. 4, 103 S.Ct., at 1945, n. 4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards."

The Court in *City of Riverside*, went on to state as follows:

> "In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future. See McCann v. Coughlin, 698 F.2d 112, 129 (CA2 1983). This deterrent effect is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable."
>
> "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit "does not for

himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.' " House Report, at 2 (quoting Newmann v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong.Rec. 33313 (1976) (remarks of Sen. Tunney).

Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, *Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief.* Rather Congress made clear that it, "intended that the amount of fees awarded under (Section 1988) be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and *not be reduced because the rights involved may be nonpecuniary in nature*" Senate Report, at 6, U.S. Code Cong. & Admin. News 1976, p. 5913 (emphasis added).

Thus, it can be learned by reading the *City of Riverside* case that the Supreme Court in the *Hensley* case did *not* mean that attorney fee awards under Section 1988 should be proportionate to the amounts of damages a civil rights plaintiff actually recovers when it stated that "where a plaintiff achieved only limited success on related claims, however, the District Court should award only that amount of fees that is reasonable in relation to the results obtained." What the Court was referring to, however, was that of *limited success on related claims.* In

the *Hensley* case the plaintiffs only prevailed on one of their six general claims. And the issue specifically addressed in Hensley was whether a partially prevailing plaintiff may recover attorney's fees for legal services on *unsuccessful claims*. Again, the Hensley Court was referring to claims and not the extent of monetary damages when stating that the District Court should award only that amount of fees which is reasonable in relation to the results obtained. The *Hensley* Court stated that where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee and where a lawsuit consists of *related claims,* a plaintiff who has won substantial relief should not have his attorney's fees reduced simply because the District Court did not adopt each contention raised. The *Hensley* Court found that all claims made by the plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail and the time devoted to claims on which plaintiff did not prevail could not reasonably be separated from the time devoted to claims on which the plaintiffs did prevail.

In the instant case, the *one claim* made by the Plaintiff was based on a common core of facts and the Plaintiff prevailed against only two of the three Defendants after the Court granted Defendant Freeman's Motion for Judgment in accordance with Motion for Directed Verdict as the jury itself had returned a verdict against Defendant Freeman after the court had denied the Defendant's Motion for Directed Verdict at trial. Based upon this, it is apparent that the Plaintiff was *successful in its one claim* against the Defendants and thus, the amount of the at-

torney's fee award should *not* be reduced because he did not receive a large monetary judgment.

Finally, the Magistrate has stated in her report that the case was utterly blown out of proportion by overzealous counsel and that the jury verdict was neither unforeseeable nor unreasonable upon the facts of the case. It is apparent by these statements that the Magistrate is attempting to hold the undersigned attorney responsible, in hindsight, for his client's decision to exercise his constitutionally protected right to trial by jury. She has allowed her participation in inadmissible settlement discussions to affect her objectivity in reporting on the Plaintiff's Motion to Tax Costs and Attorney's Fees. In addition, the undersigned attorney would like to point out that absolutely no valid settlement offer of any type has ever been made by Defendants' counsel in this action. The only "Offer" of settlement was the aforementioned quote of "I would recommend a settlement for $10,000.00 and perhaps as high as $15,000.00, but certainly no more." As stated previously, this is certainly not something which comports to be an offer of any type and thus, would have been impossible to accept even if the undersigned attorney had received permission from his client to do so.

5. Finally, the Magistrate addressed herself to the issue of taxing costs and concluded that no costs incurred subsequent to February 3, 1987 should be taxed based upon her finding that an Offer of Judgment existed pursuant to *Fed.R.Civ.P.* 68 as of that date. For the reasons set forth above, the Plaintiff disagrees with this conclusion and relies upon his argument set forth above with regard thereto and states that the remaining $4,145.06 incurred subsequent to that date should be considered as taxable costs in this action.

In addition, the Magistrate disallowed compensation for the reasonable expenses incurred by the Plaintiff in traveling from Hong Kong to attend his Deposition when the Deposition was cancelled upon short notice by the Defendants' counsel. This was evidently based upon the fact that the letter written by the undersigned attorney dated August 15, 1986, attached as Exhibit "A" to the Plaintiff's reply to this Motion "simply informed Defendants' counsel that the Plaintiff would be available for Deposition during a specified two week period and needed to know if a Deposition was to be scheduled so that the appropriate travel plans could be made. The Magistrate stated that the letter did not indicate that the Plaintiff would travel to the U.S. solely for the purpose of giving his Deposition, and a reasonable interpretation, as argued by the Defendants is that the Plaintiff would be stateside on related business during the specified period but would make himself available for the Deposition if requested." This is simply not the case. The August 15, 1986 letter was generated at the request of the Defendants' counsel who inquired of the undersigned attorney as to when the Plaintiff would be available for his Deposition to be taken. At all times, Defendants' counsel knew that the Plaintiff resided outside of the United States in Hong Kong and Defendants' counsel was fully aware that he was specifically traveling to the United States in order to have his Deposition taken in this case. As a matter of fact, the undersigned attorney expressly requested in the August 15, 1986 letter that the Defendants' counsel contact him as to the date, time and place of the Deposition in order that the Plaintiff could make his travel plans. In any event, regardless of whether Defendants' counsel knew that the Plaintiff was traveling from Hong Kong specifically for the purpose of having his Deposition taken in

this matter, the fact remains Defendants' counsel cancelled the Deposition upon extremely short notice (less than 24 hours) and he knew that the Plaintiff would be traveling from somewhere to attend his Deposition which had been duly noticed by Defendants' counsel. The fact that he was coming from Hong Kong or Timbucktu is irrelevant to the fact that he knew travel plans were being specifically made for the Plaintiff to attend the Deposition and he chose to cancel said Deposition at such a time where it was impossible for the Plaintiff to cancel his travel plans and recoup the funds expended for him to attend his Deposition. (See attached Affidavit of the undersigned attorney with regard to the facts and circumstances surrounding the setting of the Plaintiff's Deposition.)

Plaintiff also takes exception to the Magistrate's reporting that the $529.50 incurred by counsel in taking the Deposition of Leonard Brown in South Carolina is not taxable as costs. In so objecting the Plaintiff relies upon *Northcross v. Board of Education of Memphis City Schools,* C.A.Tenn. 1979, 611 Fed.2d 624, cert.den. 100 S.Ct. 2999, 3000, 447 U.S. 911, 64 L.Ed.2d 862. *Loewenson v. Turnipseed,* D.C.Miss. 1980, 505 Fed.Supp. 511. *Population Services Intern. v. Carey,* D.C.N.Y. 1979, 476 Fed. supp. 4 and *Thomas v. Board of Education,* D.C.N.Y. 1981, 505 Fed.supp. 102. All the aforementioned cases deal with travel expenses and stand for the proposition that those reasonable out-of-pocket expenses incurred by the attorneys which are normally charged to a fee paying client should be reimbursed. The Deposition of Leonard Brown for which the Plaintiff seeks reimbursement for travel expenses was a necessary expense because Mr. Brown was the only noninterested eyewitness to the violation of the

Plaintiff's Constitutional Rights and thus, the same was imperative for the complete presentation of this case.

CONCLUSION

It is for these aforesaid reasons that the Plaintiff specifically objects to the United States Magistrate's Report of February 29, 1988 and in so doing specifically requests this Court to review the Plaintiff's Motion to Tax Costs and Attorney's Fees and Memorandum in Support thereof together with the Plaintiff's Response to the Defendants' Memorandum in Opposition to the Plaintiff's Motion to Tax Costs and Attorney's Fees and entertain the possibility of a hearing and oral argument prior to its ruling on this Motion.

Kevan K. Boyles
Attorney for Plaintiff
Boyles and McCarthy
5725 Corporate Way
Suite 103
West Palm Beach, FL 33407
305-471-3446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 9th day of March, 1988 to: Julius Parker, Jr., Esq., Haben, Parker, Skelding, Costigan, McVoy & Labasky, P.O. Box 669, 318 North Monroe Street, Tallahassee, FL 323302.

.....
Attorney at Law

EXIBIT "A"

SOUTHERN STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86 1034 Civ Nesbitt
Florida Bar No. 285854

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD and EDWARD CAVANAUGH,
Defendants.

SUPPLEMENTAL AFFIDAVIT OF ATTORNEY AS TO FEES

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, personally appeared MOSES BAKER, JR., who, upon being duly sworn, deposes and states as follows:

1. Affiant is an attorney and partner of the law firm of MONTGOMERY, SEARCY AND DENNEY, P.A., with its offices in West Palm Beach, Florida.

2. Affiant has practiced law in Florida in excess of ten (10) years and is admitted to the non-trial Bar of the

United States District Court for the Southern District of Florida.

3. Affiant is familiar with civil rights litigation and more particularly with litigation with 42 USC, §1983, in both federal and state courts. Affiant has been and is now personally involved in representing clients in litigation under §1983.

4. Affiant is familiar with the prevailing market rates in the community encompassed by the Federal District Court for the Southern District of Florida for similar services by lawyers of reasonably comparable skills, experience, and reputation as that of the lawyers representing the Plaintiff in this action.

5. The Affiant is familiar with the prevailing market rates actually billed, awarded and paid in similar lawsuits involving §1983 claims. In fact, this Affiant has previously been awarded an attorney's fee in a §1983 action based upon the hourly rate of $200.00 per hour and said award was given in the legal community encompassed by the Federal District Court for the Southern District of Florida.

6. Affiant is of the opinion that 251.1 attorney hours were reasonably expended in representing the Plaintiff in this matter.

7. Affiant is of the opinion that $200.00 per hour is the prevailing and reasonable market rate in the aforementioned legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation as that of the lawyers which represented the Plaintiff in this action. However, Affiant is also aware that there are lawyers in this community who are involved in civil rights litigation who charge higher than $200.00 per hour.

Affiant is of the opinion that $200.00 per hour is the prevailing market rate based upon his own experience and based upon his discussions with other lawyers of this community who are involved in civil rights litigation.

8. Affiant has had personal discussions with other lawyers in this community who have indicated that they are charging $200.00 per hour and in some instances higher for cases involving civil rights litigation.

9. Affiant is of the opinion that a reasonable fee for the services of Boyles and McCarthy in representing the Plaintiff in this matter should be $50,000.00 and has rendered this opinion based upon the factors specified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) which are as follows:

1. The time and labor required.

2. The novelty and difficulty of the questions.

3. The skill requisite to perform the legal service properly.

4. The preclusion of employment by the attorney due to acceptance of the case.

5. The customary fee.

6. Whether fee is fixed or contingent.

7. Time limitations imposed by the client or the circumstances.

8. The amount involved and the results obtained.

9. The experience, reputation, and ability of the attorneys.

10. The "undesirability" of the case.

11. The nature and length of the professional relationship with the client.

12. Awards in similar cases.

/s/ Moses Baker, Jr.
Moses Baker, Jr.

Sworn to and subscribed before me this 7th day of March, 1988.

/s/ Claudette F. Post
Notary Public, State of
Florida at Large

My Commission expires: 10/29/90

EXHIBIT "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-Civ-NESBITT
FLORIDA BAR NO. 285854

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD, and EDWARD CAVANAUGH,
Defendants.

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO TAX COSTS AND FOR REASONABLE ATTORNEY'S FEES INCLUDING OUT-OF-POCKET EXPENSES

STATE OF FLORIDA
COUNTY OF PALM BEACH

KEVAN K. BOYLES, being duly sworn, deposes and says:

1. This Affidavit is being made in response to United States Magistrates Report of February 29, 1988 her request for more substantiation concerning the undersigned's prior experience and is supplemental to my Affidavit attached to the Motion to Tax Costs and Attorney's Fees and Memorandum in Support thereof as Exhibit "A".

2. That as previously stated, I have been a practicing attorney since 1979, admitted to the Florida Bar and the District Court for the Southern District of Florida. I am a member of the Trial Bar of this Court, a partner in the law firm of Boyles and McCarthy, and one of the attorneys for the Plaintiff in this action.

3. I have tried numeruos civil jury trials since my graduation from law school in 1979 in both the Federal and State Courts and have represented other Plaintiffs in seeking redress of federally protected constitutional rights.

4. I know of no private attorney in the area encompassing the Federal District Court for the Southern District of Florida who is compensated at a rate of $100.00 per hour for any type of legal service performed regardless of whether that be litigation or office work and have personal knowledge of $200.00 per hour being the prevailing market rate in this community for similar services by lawyers of reasonably comparable skills, experience and reputation as the undersigned in civil rights litigation under § 1983.

5. The Deposition of the Plaintiff that was scheduled herein by the Defendant and later cancelled by Defendants' counsel within twenty-four (24) hours of said Deposition, was set at the request of Defendants' counsel after he inquired of me as to when the Plaintiff would be available here in South Florida for the taking of his Deposition. At all times material thereto, Defendants' counsel had full knowledge of the fact that the Plaintiff resided outside of the continental United States and would be traveling here specifically for his Deposition. Upon receipt of the Defendants' counsel's request to inquire as to my client as to when he would be available for Deposition, I con-

tacted my client via the telephone in Hong Kong, China, on August 12, 1986 inquiring of him as to when he could make himself available for his Deposition. Subsequent to that date on August 15, 1986, I made Defendants counsel aware of when the Plaintiff would be available to have his Deposition taken here in South Florida and in due course Defendants' counsel noticed the Deposition during the two (2) week period that he was informed the Plaintiff would be available. The Deposition was cancelled within twenty-four (24) hours of its taking at the request of Defendants' counsel because he had failed to arrange his travel from Tallahassee to West Palm Beach and was unable to obtain any flight because of the fact that all flights were booked due to the Governor's Inauguration and related festivities in Tallahassee.

6. Since October 22, 1987 and based upon Boyles and McCarthy's daily time records prepared contemporaneously, 18.5 attorney hours have been devoted to this litigation making a total of 270.7 hours since May of 1984. A summary of the attorney hours incurred since October 22, 1987 is attached hereto, marked Exhibit "A" and specifically incorporated herein by reference.

/s/ Kevan K. Boyles
Kevan K. Boyles

Sworn to and subscribed before me this 9 day of March, 1988.

/s/ William (Illegible)
Notary Public
State of Florida

My commission expires: (Illegible)

EXHIBIT "A"

10/22/87	Prepare Motion to Tax Costs and Attorney's Fees for filing.	.5
11/02/87	Travel to Clerk's office to file Motion to Tax Costs and Attorney's Fees.	.5
	Review Defendants' Memorandum in Opposition to Motion to Tax Costs and Attorney's Fees.	1.0
11/03/87	Research Response to Defendants' Memorandum in Opposition to Motion to Tax Costs and Attorney's Fees.	1.0
	Dictate Response to Defendants' Memorandum in Opposition to Motion to Tax Costs and Attorney's Fees.	1.0
11/13/87	Review letter received from Doctor Iglesias.	.1
12/28/87	Review Order dated 12/16/87.	.1
3/01/88	Review Report of United States Magistrated dated 2/29/88.	1.2
3/02/88	Research in Preparation for Response to Magistrate's Report on Attorney's Fees.	2.0
3/03/88	Research requirements of Rule 68 and cases in preparation for Response to Report of Magistrate.	2.5
	Dictate Objections to Report of Magistrate with Supplemental Affidavits.	4.0
3/07/88	Telephone conference with Attorney Baker regarding Supplemental Affidavit.	.2

	Travel to Attorney Baker's office for office conference regarding Supplemental Affidavit.	1.0
	Review and edit first draft of Objections to Reports of United States Magistrate.	2.0
3/08/88	Review and edit second draft of Objections to Report of United States Magistrate.	.5
3/09/88	Final review of Objections to Report of United States Magistrate and travel to Clerk's office to file same.	.9

(Filed March 22, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-CIV NESBITT
FLORIDA BAR NO. 061269

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD, and EDWARD CAVANAUGH,
Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS TO REPORT OF UNITED STATES MAGISTRATE

This Response is filed to Plaintiff's Objections to Report of United States Magistrate on behalf of the Defendants by their undersigned counsel.

The Report of United States Magistrate dated February 29, 1988, concisely and accurately outlines the factual situation involved in this dispute over attorneys fees. Boiled down to its essence, the situation in this case is accurately described by the Magistrate on page three of her Report as follows:

> "The simple fact is that Plaintiff's counsel at all times of record, after the date of the settlement conference, flatly rejected an entirely reasonable offer of settlement in this case."

At the settlement conference in open court on January 16, 1987, counsel for the Defendants offered a settlement of at least $10,000.00, and perhaps as high as $15,000.00. The Magistrate advised opposing counsel that she thought the offer was entirely reasonable and should be accepted. At that time Plaintiff's counsel insisted that the case was worth at least $75,000.00. He reduced his demand to $45,000.00 a very short time before trial.

Counsel for the Plaintiff could have settled the case for his client for at least $10,000.00, and probably $15,000.00, as early as January of 1987. He obstinately refused to accept an entirely reasonable offer, which resulted in a jury verdict in favor of his client of zero dollars in punitive damages and a total of $3,500.00 in compensatory damages. He now seeks to sock Defendants in the case with attorneys fees in excess of $50,000.00, plus over $11,000.00 in costs.

Counsel for the Plaintiff places great weight on the United States Supreme Court's decision in *City of Riverside v. Rivera*, 477 U.S. ....., 91 L.Ed.2d 466, 106 S.Ct. ..... (1986). *Riverside*, however, did not involve the issue concerned in the case at bar, although the Court did refer to it in the following language:

> ". . . Furthermore, we have held that a civil rights defendant is ~~not~~ liable for attorney's fees incurred after a pre-trial settlement *offer*, where the judgment recovered by the plaintiff is less than the *offer*. Marek v. Chesny, 473 US ....., 87 L Ed 2d 1, 105 S Ct 3012 (1985). We believe that these safeguards adequately protect against the possibility that §1988 might produce a 'windfall' to civil rights attorneys."
>
> *91 L Ed 2d at 483.* (Emphasis supplied)

Likewise, in the case of *Evans v. Jeff D.*, 475 US ....., 89 L Ed 2d 747, 106 S Ct ..... (1986), the United States Supreme Court specifically approved the making of an offer by Defendant which included a total waiver of attorneys fees. As the Court states in its Opinion:

> "To promote both settlement and civil rights, we implicitly acknowledged in Marek v. Chesny the possibility of a tradeoff between merits relief and attorney's fees when we upheld the defendant's lump-sum offer to settle the entire civil rights action, including any liability for fees and costs."

Finally, the landmark case in this area is the United States Supreme Court's decision in *Marek, et al. v. Chesny*, 473 US ....., 87 L Ed 2d 1, 105 S. Ct. ....., 1985. A situation substantially similar to that in the case at bar occurred in *Marek*. It was disposed of by the United States Supreme Court as follows:

> "To be sure, application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates. This effect of Rule 68, however, is in no sense inconsistent with the congressional policies underlying §1983 and §1988. Section 1988 authorizes courts to award only 'reasonable' attorney's fees to prevailing parties. In Hensley v. Eckerhart, 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933 (1983), we held that *'the most critical factor' in determining a reasonable fee 'is the degree of success obtained.'* Id. at 436, 76 L Ed 2d 40, 103 S Ct 1933. We specifically noted that prevailing at trial 'may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.' Ibid. In a case where a rejected settlement *offer* exceeds the ultimate

> recovery, the plaintiff - although technically the prevailing party - *has not received any monetary benefits from the post-offer services of his attorney.* This case presents a good example: the $139,692 in post-offer legal services resulted in a recovery $8,000.00 less than petitioner's settlement *offer.*"
>
> *87 L Ed 2d at 10, 11.* (Emphasis supplied)

In summary, counsel for the Plaintiff obstinately refused an offer which would have netted his client at least $6,600.00, and perhaps as high as $10,000.00 The net result was that his client received a jury verdict in the total amount of $3,500.00, and the Court was forced to conduct a three-day jury trial. Defendants were obliged to be present for that trial and their counsel had to be present, charging a reasonable fee, of course, to defend it. In return for depriving his client of a more than reasonable offer of settlement, and obtaining a jury verdict which is less than the Plaintiff's cost of traveling to the trial from India, counsel for the Plaintiff seeks a reward in the form of a windfall award of attorneys fees of in excess of $50,000.00 and costs in excess of $11,000.00.

The Magistrate, in her Report and Recommendation of February 29, 1988, more than adequately deals with that situation. In addition, she considers and discusses in some detail all twelve of the factors specified in *Johnson v. Georgia Highway Express, Inc.*, 488 F 2d 714 (5th Cir. 1974), and accurately outlines the factual situation in this case.

CONCLUSION

Counsel for the Plaintiff has deprived his client of a reasonable settlement resulting in a verdict in his favor for substantially less than he could have settled the case

for as early as January of 1987. To reward Plaintiff's counsel with a windfall of $50,000.00 in fees and $11,000.00 in costs would be a travesty of justice. The Report of the United States Magistrate should be adopted and approved as written.

I HEREBY CERTIFY that a copy hereof has been furnished to:

Mr. Kevan K. Boyles
5725 Corporate Way
Suite 103
West Palm Beach, Florida 33407

by mail, this 16th day of March, 1988.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.
Parker, Skelding, McVoy & Labasky
P. O. Box 669 - 318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Defendants

(Filed November 3, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-Civ.-NESBITT
FLORIDA BAR NO. 285854

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD and EDWARD CAVANAUGH,
Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION TO TAX COSTS AND ATTORNEY'S FEES

COMES NOW the Plaintiff, RICHARD R. ELLIS, by and through his undersigned attorneys, and hereby files this his Memorandum in Response to Defendants' Memorandum in Opposition to the Plaintiff's Motion to Tax Costs and Attorney's Fees and in support thereof states as follows:

1. Defendants in their memorandum choose to rely on settlement discussions which are wholly irrelevant to the issue at hand. What is relevant, however, in light of their argument is the fact that the Defendants *never filed an Offer of Judgment* in this action and obviously failed to take into consideration the ramifications of the Plaintiff

receiving his costs and attorney's fees in being the prevailing party. If, in fact, the Defendants had filed an Offer of Judgment for a "minimum of $10,000.00, and perhaps as much as $15,000.00", this amount would have been together with all taxable costs incurred to the date of the Offer of Judgment and these costs would have included attorney's fees as set forth in 42 USC, Section 1988. If, in fact, an Offer of Judgment had been made along these lines, it would have been accepted in that the Plaintiff's final settlement demand of $45,000.00 was arrived at based upon the "minimum of $10,000.00 and perhaps as much as $15,000.00" settlement offer.

2. Defendants cite the U.S. Supreme Court case of Hensley v. Eckerhart 461 US 424, 76 L.Ed. 2d 40, 103 S.Ct. 1933 (S.Ct. 1983) for the proposition that the District Court should only award the amount of fees that is reasonable in relation to the results obtained. However, this quotation by the Defendants is taken out of context and the court actually ruled that although Plaintiff *need not prevail on all the claims presented* in order to recover some attorney's fees, the court should look further into whether the expenditure of the counsel's time was reasonable in relation to the success achieved; to rule otherwise could result in an excessive amount being awarded. The court declined to set a more precise standard as to how to calculate partial success in relation to fees, saying:

> "There is no precise rule or formula for making these determinations. The District Court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success."

The meaning and effect of Hensley on the definition of what constitutes a reasonable attorney's fee award

under Section 1988 was explored in City of Riverside v. Rivera, 106 S.Ct. 2686, 91 L.Ed. 2d 466. In that case, the Plaintiffs had recovered $33,350.00 in compensatory and punitive damages arising from violations of the First, Fourth and Fourteenth Amendments, as well as some state law claims. The District Court awarded them $245,-456.25 in attorney's fees based on the total number of hours expended in the case, but refusing to apply any multiplier for contingency or quality. The Ninth Circuit affirmed and the Supreme Court agreed.

Writing for the members of the majority, Justice Brennan rejected the contention that the fee should have been reduced because Plaintiffs had not prevailed on all the original claims or against all the original thirty-one (31) defendants. Instead, he ruled that the lower court was not clearly erroneous in allowing total compensation based on its conclusion that all Plaintiff's claims were based on a common core of facts and that the size of the damage award did not imply limited success, but their success was more accurately reflected by the excellent results achieved in a highly complex case. Finally, *Justice Brennan rejected the argument that the use of the lodestar approach to calculate fees was inappropriate when Plaintiff recovers only money damages and that the fee should be proportionate to the recovery.* He noted that civil rights actions were not simply private tort suits and that Congress in enacting Section 1988 had expressly recognized that Plaintiffs in such actions function as "private attorneys general" and thus that *fees in those actions were not to depend on obtaining substantial monetary relief.*

3. Defendants also cite the case of Marek v. Chesny, 473 US 1, 87 L.Ed. 2d 1, 105 S.Ct. 3012 (St.Ct. 1985). The Marek case is completely irrelevant to any argument in

this action in that said case discusses Rule 68 Federal Rules of Civil Procedure regarding Offers of Judgment. Again, no Offer of Judgment was ever filed in this action.

4. Defendants also argue that they should not be responsible for the costs involved in bringing the Plaintiff to South Florida to be deposed at the Defendants' request. Defendants state that they had now way of knowing that he would have come from such a long distance or that he would have left five (5) days in advance of the Deposition and that he obviously had other business and other reasons for returning to the State of Florida at that time because he arrived on January 2, 1987 and the Deposition was scheduled for January 7, 1987. This is factually inaccurate and is a complete misrepresentation to the Court as the Defendants, by and through their counsel, were fully aware of the fact that the Plaintiff was on assignment with the Reuters News Agency International in Indochina and that he required as much notice as possible as to the date of his Deposition in order that he could make his travel plans. Attached hereto, marked Exhibit "A", and specifically incorporated herein by reference, is a copy of the August 15, 1986 letter from the undersigned to Defendants' counsel setting forth the Plaintiff's whereabouts. The Plaintiff's Deposition was subsequently scheduled for January 7, 1987 and the Defendants' counsel was fully aware of the fact that the Plaintiff was traveling half way around the world to attend his Deposition. To do this the Plaintiff was required to be air borne for more than twenty-four (24) hours with transfers in Paris and New York. It was imperative that he leave a sufficient time prior to his Deposition in order that he might recover from any jet lag and have the opportunity to meet with his attorney prior to the Deposition and prepare therefore. It is also important to note that January 7, 1987 was a

Wednesday and the Pre-Deposition Conference was scheduled for Tuesday, January 6, 1987, because the Plaintiff's attorney was unavailable on Monday, January 5, 1987. (He was attending a Deposition that was being taken in this case in Greenville, South Carolina.)

5. Finally, the Defendants argue that the claim for expert witness fees for Dr. Iglesias should be denied. Plaintiff believes this is erroneous in that Dr. Iglesias was extremely valuable to the development of the Plaintiff's case and thus, pursuant to Schmid v. Frosch, D.C.D.C. 1985, 609 F.Supp. 490, his fees should be taxed against the Defendants herein. In the alternative, however, if, in fact, Dr. Iglesias' fees are determined not to be taxable, Plaintiff requests the statutory witness fee for his appearance which would be equal to $63.75.

CONCLUSION

Based upon the foregoing and the fact that the taxing of attorney's fees in Section 1988 actions are not dependent on obtaining substantial monetary relief, the Plaintiff requests that attorney's fees be taxed against the Defendants herein in the amount of $50,000.00 pursuant to those Affidavits filed in support of the Plaintiff's Motion, together with all other applicable costs as set forth in Plaintiff's Motion to Tax Costs and Attorney's Fees.

/s/ Kevan K. Boyles
Kevan K. Boyles
Attorney for Plaintiff
Boyles and McCarthy
5725 Corporate Way
Suite 103
West Palm Beach, FL 33407
305-471-3446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 3rd day of November, 1987 to: Julius Parker, Jr., Esq., Haben, Parker, Skelding, Costigan, McVoy & Labasky, P.O. Box 669, 318 North Monroe Street, Tallahassee, Florida 32302.

/s/ Kevan K. Boyles
Attorney at Law

EXHIBIT "A"

BOYLES AND McCARTHY
Attorneys at Law

Kevan K. Boyles
William McCarthy

Corporate Building
5725 Corporate Way
Suite 103
West Palm Beach, FL 33407
(305) 471-3446

August 15, 1986

Julius F. Parker, Jr., Esq.
SKELDING, COSTIGAN, McCOY & LABASKY
P.O. Box 669
318 North Monroe Street
Tallahassee, FL 32302

Re: Ellis V. Freeman, et al.
United States District Court
for the Southern District of Florida
Case No. 86-1034-Civ-Nesbitt
Our File No. 84-252

Dear Mr. Parker:

As I am sure you are aware the Court in the above-referenced action has set a Pre-Trial Conference for October 20, 1986 and in the Order setting said Pre-Trial Conference cut off all Discovery subsequent to October 14, 1986.

Based upon the foregoing, please be advised that my Client, who is on assignment with Reuters News Agency International in Indochina, will be available to be deposed during the two-week period beginning September 2 through September 12, 1986.

If you wish to take his deposition, it would be greatly appreciated if you would contact me as soon possible with regard to the date, time and place of said deposition in order that my Client may make his travel plans.

If any of the above is not clear, or if you have any questions with regard thereto, please do not hesitate to call.

Very truly yours,

Boyles and McCarthy
Kevan K. Boyles

KKB: tsn

(Filed November 3, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-CIV NESBITT
FLORIDA BAR NO. 061269

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD, and EDWARD CAVANAUGH,
Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION TO TAX COSTS AND ATTORNEYS FEES

This Memorandum is filed on behalf of Defendants in opposition to Plaintiff's Motion to Tax Costs and Attorneys Fees herein.

Counsel for the Plaintiff had the opportunity to settle this action as early as the Pre-Trial Conference held on January 16, 1987, for a minimum of $10,000.00, and perhaps as much as $15,000.00. Plaintiff's counsel adamantly refused at that time to consider any offer less than $75,000.00. Counsel for Plaintiff made his final settlement demand by letter dated May 14, 1987, in the amount of $45,000.00. Counsel for Plaintiff was advised

by Magistrate Charlene Sorrentino at the Pre-Trial Conference that $10,000.00 to $15,000.00 was more than fair as a settlement offer and was advised by the undersigned that the case could be settled for $10,000.00 and perhaps as much $15,000.00, that amount to include all costs and attorneys fees.

Counsel for Plaintiff stubbornly refused to reduce his settlement demands below $45,000.00 and insisted on taking the case to trial, resulting in a jury verdict of $3,500.00. The jury's verdict is not only substantially less than the amount Plaintiff could have settled for back in January 1987, but in fact is less than the cost of transportation for Plaintiff and his wife from New Deli, India, to Miami for the trial. The actions of counsel for Plaintiff in refusing to entertain reasonable settlement offers prior to trial gained absolutely nothing for the Plaintiff and, in fact, cost him as much as $11,500.00.

Attached hereto and incorporated by reference is the Affidavit of the undersigned, Julius F. Parker, Jr., counsel for Defendants throughout this litigation.

Two recent decisions of the United States Supreme Court are relevant to the questions presented by Plaintiff's Motion. The first is *Hensley v. Eckerhart,* 461 U.S. 424, 76 L.Ed. 2d 40, 103 S.Ct. 1933 (S.Ct. 1983). In that case the United States Supreme Court clearly held that:

> "But where the Plaintiff achieved only limited success, the District Court should award only that amount of fees *that is reasonable in relation to the results obtained.*"
>
> *76 L.Ed. 2d at 55.* (Emphasis supplied)

The second case is *Marek v. Chesny,* 473 U.S. 1, 87 L.Ed. 2d 1, 105 S.Ct. 3012 (S.Ct. 1985). In *Marek,* supra, the United States Supreme Court reversed an award of attorneys fees in a case in which the Defendant had offered to settle the case for $100,000.00 and the Plaintiff at trial was awarded a total of $60,000.00. The District Court declined to award costs, including attorneys fees incurred after the Offer of Judgment. The Court of Appeals for the Seventh Circuit reversed, and the United States Supreme Court reversed the Court of Appeals, thereby reinstating the decision of the District Court.

In its discussion of Rule 68 of the Federal Rules of Civil Procedure, the Supreme Court held as follows:

> "Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs - along with other plaintiffs - who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants."
>
> *87 L.Ed 2d at 10.*

The Court goes on to say that:

> "Rather than 'cutting against the grain' of §1988, as the Court of Appeals held, we are convinced that applying Rule 68 in the context of a §1983 action is consistent with the policies and objectives of §1988. Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives."

In his closing argument in the trial, counsel for Plaintiff asked the Jury to bring in a verdict for compensatory damages in the amount of $25,400.00, plus $200,000.00 in punitive damages. The Jury's verdict was for $3,500.00 in actual or compensatory damages and zero dollars for punitive damages. In addition, the Court has granted the Motion of Defendant Freeman for Judgment in Accordance with his Motion for Directed Verdict, so that as to one of the three Defendants, the Plaintiff is not the prevailing party.

As to the costs claimed by Plaintiff, they are patently unreasonable. He claims $1,246.24 for preliminary investigative services paid to Dillon-Kluth Corporation. He claims $4,550.00 in travel expenses for the Plaintiff to travel from Hong Kong to West Palm Beach for a deposition which was cancelled. Although the itemization of costs states that the deposition was cancelled within twenty-four hours of its scheduled date, which was January 7, 1987, Mr. Ellis apparently traveled to West Palm Beach on January 2, 1987, and obviously had other business and other reasons for returning to Florida at that time. Defendants had no way of knowing that he would have to come from such a long distance or that he would have left five days in advance of the deposition.

The claim of $1,588.50 for the expert testimony of Dr. Iglesias should clearly be denied. Expert witness fees are not ordinarily awarded in excess of the statutory witness fee and Dr. Iglesias' testimony obviously did not affect the jury, which is evident from their minimal verdict in favor of the Plaintiff. Likewise, Plaintiff's counsel should not be able to recover his own travel expenses and hotel bills for his stay in Miami during the trial.

As argued above, Plaintiff should not be entitled to recover any attorneys fees or costs incurred subsequent to the Pre-Trial Conference held January 16, 1987, at which time counsel for the Plaintiff was advised that the case could be settled for $10,000.00 to $15,000.00, which he obstinately and stubbornly refused to accept.

CONCLUSION

In view of the results obtained and Plaintiff's failure to accept more than reasonable settlement overtures, Defendants submit that a reasonable attorney fee in this action would not exceed the amount of the verdict, or $3,500.00.

Respectfully submitted,

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.
Parker, Skelding, McVoy
& Labasky
P. O. Box 669 - 318 N. Monroe
Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Defendants

I HEREBY CERTIFY that a copy hereof has been furnished to:

Mr. Kevan K. Boyles
5725 Corporate Way
Suite 103
West Palm Beach, Florida 33407

by mail, this 28th day of October, 1987.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.

AFFIDAVIT OF JULIUS F. PARKER, JR.

STATE OF FLORIDA
COUNTY OF LEON

BEFORE ME, the undersigned authority, personally appeared Julius F. Parker, Jr., well known to me, who being by me first duly sworn, did depose and say:

My name is Julius F. Parker, Jr. and I am counsel for all Defendants in the case of *Ellis v. Freeman, et al.*, Case No. 86-1034-Civ-Nesbitt, pending in the Southern District of Florida.

A Pre-Trial Conference was held in the case before Magistrate Charlene Sorrentino on January 16, 1987. Magistrate Sorrentino strongly recommended to Plaintiff's counsel at that Pre-Trial that he attempt to settle the case and she then adjourned the hearing to allow us to discuss the matter. I advised opposing counsel that I would recommend a settlement for $10,000.00 and perhaps as high as $15,000.00, but certainly no more. I also advised him that the sum we agreed on would have to include all costs and attorneys fees. Opposing counsel advised that he thought the case was worth at least $75,000.00.

We then went back into the Courtroom and advised the Magistrate of our discussions. She remarked to Plaintiff's counsel that, "If I were you, I would take the $10,000.00 or $15,000.00 and run".

Opposing counsel, some twelve days later, wrote me a letter dated January 28, 1987, making a settlement demand of $75,000.00. A copy of that letter is attached hereto as Exhibit "A". I wrote to my client, the Florida Sheriffs Self-Insurance Fund, with a copy to Sheriff Freeman, advising what had happened and also advising that

I would recommend a settlement offer in the amount of $10,000.00, or perhaps even as high as $15,000.00. A copy of that letter is attached hereto as Exhibit "B". On February 3, 1987, I wrote a letter to opposing counsel, Kevin Boyles, again advising I would recommend settlement for $10,000.00 to $15,000.00. A copy of that letter is attached hereto as Exhibit "C". On May 14, 1987, approximately one month before trial, Mr. Boyles wrote to me making a final settlement deman of $45,000.00. A copy of that letter is attached hereto as Exhibit "D".

After a three day trial the Jury returned a verdict in favor of the Plaintiff in the total amount of $3,500.00 in compensatory damages and zero dollars in punitive damages.

Subsequently, the Court granted my motion on behalf of Defendant Sheriff Freeman for Judgment in accordance with his Motion for Directed Verdict, so that Sheriff Freeman is now a prevailing party. Mr. Boyles has now filed a Motion to Tax Attorneys Fees against the Defendants in the total amount of in excess of $50,000.00, plus almost $11,000.00 in claimed costs and expenses, including travel expenses, hotel bills, telephone charges, postage and copying.

Further Affiant sayeth not.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.

SWORN to and SUBSCRIBED before me this 28th day of October, 1987.

/s/ Virginia A. Cullifer
Notary Public State of
Florida at Large

My Commission expires: Oct 21, 1988
(Seal)

EXHIBIT "A"

BOYLES AND McCARTHY
Attorneys at Law

Kevan K. Boyles
William McCarthy

Corporate Building
5725 Corporate Way
Suite 103
West Palm Beach, FL 33407
(305) 471-3446

January 28, 1987

Mr. Julius F. Parker, Jr., Esq.
Parker, Skelding, Costigan,
McVoy & Labasky
P.O. Box 669
Tallahassee, Florida 32302

Re: Ellis v. Freeman, et al.,
Case No. 86-1034-CIV-NESBITT
Our File No. 84-252

Dear Fred:

Pursuant to the events that occurred at the Pre-Trial Conference in the above-referenced matter, I have reviewed this case in its entirety with both my client and other independent attorneys who I believe are knowledgeable in this matter. After doing so, I am now able to make you a firm settlement demand in order that all parties may settle this matter in a compromise fashion. Please be advised that my client will settle *now* for $75,000.00. This demand is made even though I believe this case has substantial jury appeal because of the outrageousness of your client's acts and even though I would anticipate a higher verdict at trial because of

the various elements of my client's damages, to wit: compensatory damages for physical injuries together with emotion distress, punitive damages and attorney's fees, and even though I would have no difficulty in asking a jury for $300,000 in total damages. I have attempted to make an evaluation which is both fair and realistic at this point in the proceedings.

This offer is obviously made as an inadmissible one and in compromise of what we continue to believe is a substantial claim. Please let me know as soon as possible if this is agreeable to you. If not, I can only suggest that we proceed to prepare for trial in that the same could be set at any time and upon relatively short notice.

Based upon the foregoing, please let me know a convenient date for which we can take the various Depositions in Key West. I would prefer that these Depositions be set as soon as possible in order that they may be taken prior to the discovery cut off which will be two (2) weeks prior to trial.

Trusting that I will hear from you in the very near future, I remain

Very truly yours,

Boyles and McCarthy
/s/ Kevan
Kevan K. Boyles

KKB:cc

EXHIBIT "B"

Law Offices
PARKER, SKELDING, COSTIGAN,
McVOY & LABASKY
The Madigan Building
318 North Monroe Street
Tallahassee, Florida

Julius F. Parker, Jr.
Jack M. Skelding, Jr.
John W. Costigan
Ross A. McVoy
Ronald A. Labasky
Keith C. Tischler
Terrell C. Madigan
David D. Eastman

Gayle Smith Swedmark
Of Counsel

Julius F. Parker
(1910-1966)
John A. Madigan, Jr.
(1919-1984)
Millard F. Caldwell
(1897-1984)

Reply To: P.O. Box 669
Tallahassee, FL 32302
Tele: (904) 222-3730

February 2, 1987

Mr. Joe Gillespie
Vice President - Claims
Florida Sheriffs Self Insurance Fund
P. O. Box 12909
Tallahassee, Florida 32317

Re: Richard R. Ellis v. Freeman, et al.
Claim No. 1986-173-84 - Record No. 1422

Dear Joe:

We had a Pre-Trial Conference in the above case before the U. S. Magistrate in Miami on January 16, 1987. This

is the case in which the Plaintiff was drunk and disorderly and tore off the showerhead in the holding cell and he was, therefore, shackled by wrists and ankles to the jail bars for a period of perhaps as much as four hours.

The Magistrate strongly recommended to Plaintiff's counsel that he attempt to settle the case. She adjourned the hearing to allow the attorneys to talk about possible settlement. I advised opposing counsel that I would recommend a settlement for something on the order of $10,000.00 to perhaps as high as $15,000.00, but certainly no more than that and any sum we agreed on would have to include all costs and attorneys fees. Opposing counsel advised that he thought the case was worth at least $75,000.00.

We went back in the Courtroom and advised the Magistrate of what had happened. She told Plaintiff's counsel that if she were he, she would take the $10,000.00 or $15,000.00 and run.

I've just received the enclosed letter dated January 28, 1987, from opposing counsel in which he makes a settlement demand for $75,000.00 and indicates he would ask the Jury in the case for $300.00 [sic] should be $300,000.00 in the event we are unable to settle the case. I consider both of those figures to be absolutely outrageous, but in view of the demand which has been made, I'm going to raise the reserve in the case to $25,000.00 and request that you notify the excess carrier just to be on the safe side.

I'm going to be in Key West on Thursday of this week on several matters and plan to interview the officers involved at that time. I'll give you my evaluation of them as witnesses as soon as I return from Key West.

I look forward to seeing you and the Hunts at the Mid-Winter Conference of the Sheriffs in Crystal River.

With best regards, I am

Sincerely yours,

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.

JFPJr/vc

EXHIBIT "C"

Law Offices
PARKER, SKELDING, COSTIGAN,
McVOY & LABASKY
The Madigan Building
318 North Monroe Street
Tallahassee, Florida

Julius F. Parker, Jr.
Jack M. Skelding, Jr.
John W. Costigan
Ross A. McVoy
Ronald A. Labasky
Keith C. Tischler
Terrell C. Madigan
David D. Eastman

Gayle Smith Swedmark
Of Counsel

Julius F. Parker
(1910-1966)
John A. Madigan, Jr.
(1919-1984)
Millard F. Caldwell
(1897-1984)

Reply To: P.O. Box 669
Tallahassee, FL 32302
Tele: (904) 222-3730

February 3, 1987

Kevan K. Boyles, Esquire
Attorney at Law
5725 Corporate Way
Suite 103
West Palm Beach, Florida 33407

Re: Ellis v. Freeman, et al.
Case No: 86-1034 CIV-NESBITT

Dear Kevan:

I have passed on your settlement demand of $75,000.00 as contained in your letter of January 28, 1987, with the

recommendation that it be declined. I am still willing to recommend settlement for between $10,000.00, and possibly as high as $15,000.00, but absolutely no more. I agree wholeheartedly with the Magistrate's statement to you that "If I were you I would take the $15,000.00 and run."

I'm going to be in Key West on Thursday of this week at which time I hope to have executed the remaining Interrogatories you inquired about setting forth the Correctional Officers training of the Officers involved and outlining in detail the equipment available at the Monroe County Jail for restraint of prisoners who are causing a disturbance or creating a danger to the themselves or others.

As to the depositions you want to take in Key West, I can take them almost any day the week of February 9, or the week of February 23rd.

With best regards, I am

Sincerely yours,

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.

JFPJr/vc

EXHIBIT "D"

BOYLES AND McCARTHY
Attorneys at Law

Kevan K. Boyles
William McCarthy

Corporate Building
5725 Corporate Way
Suite 103
West Palm Beach, FL 33407
(305) 471-3446

May 14, 1987

Julius F. Parker, Esq.
PARKER, SKELDING, COSTIGAN
McVOY & LABASKY
The Madigan Building
318 North Monroe Street
Tallahassee, FL 32302

Re: Ellis v. Freeman, et al.
Our File No. 84-252

Dear Fred:

Pursuant to your request, this letter presents you with a Settlement Demand so that all parties may conclude this matter in a compromise fashion.

Please remember that if we are to settle this matter we must do so no later than Friday, May 22, 1987 in that my client will be leaving New Dehli, India shortly thereafter to return here to South Florida to participate in the Trial beginning June 8.

As we most recently discussed, it is my opinion that this case has substantial value in that my client is a well-

educated professional man, with high security clearances for his work with such people as the President of the United States, the Queen of England, and the Pope, and he will make a good witness at Trial on his own behalf. In addition, it is readily apparent that the Defendants violated Section 33-8 and failed to follow their own Policies and Procedures Manual in numerous respects. These facts coupled with the relative intelligence of Defendants Mumford and Cavanaugh and their complete lack of memory of the incident in question and the fact that this case will be tried in Miami, where I would expect to obtain a more favorable jury toward my client's case, have led me to this conclusion.

Pursuant to your request, I have reviewed Magistrate Smargon's Report and Recommendation in the case of Mitchell v. Collier and have concluded that although the facts are strikingly similar, they differ in one major respect, that being that although Mr. Mitchell's episode of chaining and shackling, etc., was of "unspecified duration" it concluded when he was unshackled in exchange for his promise of silence. In the instant case, Mr. Ellis' "episode" was of approximately five hours and they failed to unshackle him although he pleaded and begged with them to do so from the point of approximately one/half of one hour after the inital shackling. It is this circumstance which clearly violates the Fourth Amendment Due Process Clause in that the same was grossly disproportionate to the need for action under the circumstances and it amounted to an abuse of power that shockes the conscience.

Finally, and based upon the foregoing, please be advised that we will settle now for forty-five thousand ($45,000.00) dollars. Even though I believe this case has substantial jury appeal, particularly because this case is being tried

in the city of Miami and the outrageousness of the Defendant's actions, I have attempted to make an evaluation that is both fair and realistic in this proceeding. Please remember that I have contacted numerous individuals, including other attorneys and specialists in this area, and they have corroborated my opinion as to the value of this case. Also, please remember that even if this case is only worth what you and Magistrate Sorentino believe it to be, that being ten to fifteen thousand ($10,000.00 to $15,000.00) dollars, the attorney's fees that I would request for representing Mr. Ellis in a successful claim would *easily match that amount and probably exceed* the same.

It would be greatly appreciated if you would forward this letter to your client as soon as possible. Please remember that if this matter is not settled on or before 5:00 o'clock P.M. on Friday, May 22, 1987, that all offers of settlement will be withdrawn and this matter will be tried. Please understand that the reason for this is that my client is going to considerable expense to make himself available here in South Florida for the Trial and he will be leaving New Dehli, India immediately subsequent to that date.

If any of the above is not clear, or if you have any questions with regard thereto, please do not hesitate to call.

Trusting that I will be receiving some form of a response from you prior to May 22, 1987, I remain,

Very truly yours,

Boyles and McCarthy
/s/ Kevan K. Boyles
Kevan K. Boyles

KKB: tsn

(Filed December 21, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-2370-CIV-NESBITT

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD, and EDWARD CAVANAUGH,
Defendants.

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate Charlene Sorrentino for a report and recommendation on Plaintiff's Motion to Tax Costs and Attorney's Fees and Memoranda in Support Thereof, in accordance with 28 U.S.C. Section 636(b).

DONE AND ORDERED at Miami, Dade County, Florida, this 16 day of December, 1987.

/s/ Lenore C. Nesbitt
Lenore C. Nesbitt
U.S. District Judge

cc: Kevan K. Boyles, Esq.
Julius Parker, Jr., Esq.
Magistrate Charlene Sorrentino

II.121687.hh

(Filed October 22, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-Civ-NESBITT
FLORIDA BAR NO. 285854

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD, and EDWARD CAVANAUGH,
Defendants.

MOTION TO TAX COSTS AND ATTORNEY'S FEES AND MEMORANDA IN SUPPORT THEREOF

NOW COMES the Plaintiff, RICHARD R. ELLIS, by and through his undersigned attorneys, BOYLES AND McCARTHY, and moves this Court to tax costs pursuant to Rule 54(d) of the Florida Rules of Civil Procedure and for attorney's fees, including out-of-pocket expenses, pursuant to 42 USC, Section 1988, and in support thereof states as follows:

1. The above entitled action was brought by the Plaintiff against the Defendants herein to redress the deprivation of the Plaintiff's rights, privileges and immunities protected by the Constitution and the laws of the United States of America in the State of Florida, par-

ticularly, but not limited to, the Fourteenth Amendment of the Constitution of the United States as provided by 42 USC, Section 1983, 28 USC, Section 1331 and Section 1346.

2. Rule 54(d) of the Federal Rules of Civil Procedure provides that costs shall be allowed as a matter of course to the prevailing party in any action and 42 USC, Section 1988 provides that the Court, in its discretion, may award reasonable attorney's fees, including out-of-pocket expenses, as part of the costs to a successful litigant in an action to enforce 42 USC, Section 1983.

3. This Court on June 18, 1987 did enter a Final Judgment in favor of the Plaintiff herein and on September 24, 1987 entered an Order granting Defendant, FREEMAN'S, Motion for Judgment in Accordance with Motion for Directed Verdict.

4. Based upon the Final Judgment in this action, the Plaintiff is the prevailing party and is entitled to have his costs taxed against the Defendant and said costs should include an award of reasonable attorney's fees and out-of-pocket expenses.

5. Although the District Court has discretion in deciding whether to award attorney's fees to a prevailing party in a civil rights action, said discretion is narrowly limited and the prevailing Plaintiff should ordinarily recover attorney's fees unless special circumstances would render such an award unjust. See Boones v. Long, C.A. Va. 1979, 599 Fed. 2d 1316 and David v. Travisono, C.A.R.I. 1980, 621 Fed. 2d 464.

6. The statutory authority to award reasonable attorney's fees to civil rights Plaintiffs include authority to award those reasonable out-of-pocket expenses incurred

by the attorneys which are normally charged to a fee paying client; therefore, reasonable photocopying, travel, including transportation, meals and lodging, together with messenger's fees and long distance telephone costs are recoverable. See Northcross v. Board of Education of Memphis City Schools, C.A. Tenn. 1979, 611 Fed. 2d 624, certiorari denied, 100 S.Ct. 2999, 3000, 447 US 911, 64 L. Ed. 12d, 862; Population Services Intern v. Carey, D.C. N.YY. 1979, 476 F. Supp. 4.

7. The prosecution of this complex case has heavily taxed the resources of Plaintiff's counsel in terms of expenditure of funds and attorney's time. Over Eleven Thousand Dollars ($11,000.00) of funds have been expended in the prosecution of this action and over Two Hundred and Fifty (250) hours have been spent in the preparation and presentation of this case. Plaintiff's Attorney's Affidavits with regard to expended funds and attorney's time devoted to the case are attached hereto, marked Exhibit "A", and specifically incorporated herein by reference.

WHEREFORE, Plaintiff respectfully requests that this Court award him all reasonable costs, attorney's fees, and out-of-pocket expenses to be taxed against the Defendants and order such other and further relief as may be equitable and just.

/s/ Kevan K. Boyles
Kevan K. Boyles
Attorney for Plaintiff
Boyles and McCarthy
5725 Corporate Way
Suite 103
West Palm Beach, FL 33407
305-471-3446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 22 day of October, 1987 to: Julius Parker, Jr., Esq., Haben, Parker, Skelding, Costigan, McVoy & Labasky, P.O. Box 669, 318 North Monroe Street, Tallahassee, FL 32302.

/s/ Kevan K. Boyles
Attorney at Law

EXHIBIT "A"

(Filed October 22, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1034-Civ-NESBITT
FLORIDA BAR NO. 285854

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD and EDWARD CAVANAUGH,
Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO TAX COSTS AND FOR REASONABLE ATTORNEY'S FEES INCLUDING OUT-OF-POCKET EXPENSES

KEVAN K. BOYLES, ESQ., being duly sworn, deposes and says:

1. I am a practicing attorney since 1979, admitted to practice and a member of the Trial Bar of this Court, a partner in the law firm of BOYLES AND McCARTHY, and one of the attorneys for the Plaintiff in this action. I submit this Affidaviit in support of Plaintiff's Motion to Tax Costs and for Reasonable Attorney's Fees, Including Out-of-Pocket Expenses.

2. Since March, 1985, and based on Boyles and McCarthy's daily financial records of this case prepared contemporaneously, I have determined that $10,982.47 has been expended herein. A Summary of all expenditure funds is attached hereto, marked Exhibit "A", and specifically incorporated herein by reference.

3. Since May 18, 1984, and based on Boyles and McCarthy's daily time records prepared contemporaneously, 252.2 attorney hours have been devoted to this litigation. A Summary of the attorney hours is attached hereto, marked Exhibit "B" and specifically incorporated herein by reference.

4. Counsel's employment was and is on a contingent basis. A copy of the fee agreement is attached hereto, marked Exhibit "C", and specifically incorporated herein by reference.

/s/ Kevan K. Boyles
Kevan K. Boyles
Attorney for Plaintiff
Boyles and McCarthy
5725 Corporate Way
Suite 103
West Palm Beach, FL 33407

SWORN TO AND SUBSCRIIBED before me this 22nd day of October, 1987.

/s/ Karen C. Tebecio
Notary Public

My Commission expires: Feb. 18, 1991.
(Seal)

EXHIBIT "A"

DATE		FOR	AMOUNT
3/28/85	Dillon-Kluth Corporation	Preliminary Investigative Services	$ 1,246.24
5/13/86	Clerk of District Court	Filing Fee	$ 60.00
5/13/86	Harry Sawyer, Process Server	Service of (3) Summons	$ 45.00
12/8/86	John M. Belk, Process Server	Service of Deposition Subpoena on L. Brown	$ 20.00
12/19/86	Kevan K. Boyles, Esq.	Travel to Key West to review documents produced Per Request to Produce	$ 156.50
1/2/87	Richard Ellis	Travel expenses to attend his Deposition in Florida, scheduled in advance for convenience of all participants, and cancelled by Defendant's counsel within 24 hrs. of scheduled Depo. of Plaintiff	
		Round-Trip Airfare Hong Kong to WPB, FL	$ 2,200.00
		Hotel/Transfers in NYC	$ 150.00
		Hotel in WPB	$ 500.00
		Food	$ 400.00
		Rental Car	$ 500.00

DATE		FOR	AMOUNT
		Gasoline	$ 100.00
		Loss of one week's wage	$ 700.00
1/6/87	Kevan K. Boyles, Esq.	Travel to Greenville, S.C. for Deposition of L. Brown	$ 529.50
1/14/87	Doctor's Clinic	Medical Records and Itemized Bill	$ 20.00
1/14/87	George Washington Univ. Medical Center	Medical Report	$ 40.00
1/27/87	Harry Sawyer, Process Server	Service of Subpoena on Records Custodian of Keys Comm. College	$ 15.00
1/28/87	Judy Comp. & Assoc.	Original and one copy of Deposition of L. Brown	$ 177.67
3/11/87	Harry Sawyer, Process Server	Service of Subpoena on F. Sauer	$ 15.00
4/9/87	Kevan K. Boyles, Esq.	Travel Expenses to Key West to attend Depositions.	$ 223.50
4/17/87	U.S. Postmaster	Address Info. Request on J. Beauregard	$ 1.00
4/17/87	Associated Court Reporters	Attendance Fee and Depo Transcripts of Wm. Freeman, Lawrence Meggs, Henry Mumford, Edward Cavanaugh, Joseph Disher and Robert Hill	$ 437.30

DATE		FOR	AMOUNT
5/16/87	Harry Sawyer, Investigations	Photographs of Cell at Monroe Co. Jail	$ 100.27
5/29/87	Robert Hill	Witness Fee	$ 60.75
5/29/87	Rachel S. Carico	Witness Fee	$ 60.75
5/29/87	William Freeman, Jr.	Witness Fee	$ 60.75
5/29/87	Donald E. Key	Witness Fee	$ 60.75
5/29/87	Edward Cavanaugh	Witness Fee	$ 60.75
5/29/87	Henry Mumford	Witness Fee	$ 60.75
5/29/87	Lawrence Meggs	Witness Fee	$ 60.75
5/29/87	Harry Sawyer, Process Server	Service of Trial Subpoenas	$ 125.00
5/29/87	Same Day Plus Delivery Service	Shipping Charges to Harry Sawyer in Key West	$ 11.50
6/4/87	Harry Sawyer, Process Server	Service Fee of Trial Subpoena	$ 15.00
6/4/87	Same Day Plus Delivery Service	Shipping Charges to Harry Sawyer in Key West	$ 11.50
6/6/87	Gold Photo	Enlargement of Cell Photographs	$ 84.00
6/18/87	Alex Iglesias, Ph.D. Licensed Psychologist	Psychological Evaluation, Structured Clinical Interview, Preparation & appearance in Federal Court in Miami	$ 1,588.50

DATE		FOR	AMOUNT
7/10/87	Kevan K. Boyles, Esq.	Biscayne Bay Marriott Hotel Stay during Trial in Miami	$ 455.28
10/5/87	Associated Court Reporters	Attendance Fee and Deposition Transcripts of Donald K. Key, Frank Sauer and Rachel S. Carico	$ 248.84
	Boyles and McCarthy	Photocopying Costs	$ 192.20
	Boyles and McCarthy	Postage	$ 28.61
	Boyles and McCarthy	Long Distance Telephone Calls	$ 182.31
		TOTAL EXPENSES	$11,004.97

EXHIBIT "B"

05/18/84	Initial Office Conference with Client and Mary Beth Doyle.	.7
05/18/84	Telephone conference with Client and Attorney Pallo regarding cause of action.	.5
05/22/84	Telephone conference with Pat McGinley regarding medical referral.	.3
05/29/84	Telephone conference with Client regarding telephone number in Washington, D.C. and various treatments by physicians.	.3
06/12/84	Telephone conference with Jim Hurley, Esq.	.3
06/12/84	Telephone conference with Client.	.5
06/20/84	Telephone conference with Client regarding psychiatrist he is seeing and orthopedic surgeon and pictures for investigation.	.3
06/20/84	Telephone conference with William Kuyper's office.	.3
06/20/84	Dictate letter to William Kuyper, Esq., Attorney representing Mr. Ellis for criminal charges.	.2
06/22/84	Research Section 1983 Actions	1.0
07/02/84	Telephone conference with William Kuyper, Esq.	.3
07/17/84	Telephone conference with Client.	.3
07/23/84	Receipt and review of Deferred Prosecution Agreement.	.5

07/24/84	Telephone conference with Client.	.3
08/07/84	Receipt and review of correspondence received from William Kuyper, Esq.	.3
08/10/84	Receipt and review of correspondence and Arrest Report received from William Kuyper, Esq.	.3
08/15/84	Receipt and review of Narrative Summary.	.8
08/28/84	Receipt and review of correspondence.	.3
08/30/84	Telephone conference with Client.	.3
09/24/84	Meeting with John Dillon, Investigator.	.8
09/25/84	Telephone conference with Client.	.3
01/09/85	Telephone conference with John Dillon, Investigator.	.3
01/09/85	Telephone conference with Client.	.3
01/18/85	Receipt and review of correspondence.	.3
01/21/85	Review file; Conference with John Dillon.	1.8
01/22/85	Dictate letter to Client.	.5
01/22/85	Dictate letter to William Kuyper, Esq.	.3
01/22/85	Distate letter to Doctor Ciejek.	.3
01/22/85	Telephone conference with Doctor's Clinic in Vero Beach.	.3
01/25/85	Receipt and review of correspondence.	.3
01/31/85	Dictate letter to Doctor Weisel.	.3
02/07/85	Receipt and review of correspondence.	.3
02/26/85	Telephone conference with John Dillon, Investigator.	.5
03/13/85	Telephone conference with Client.	.3

04/04/85	Telephone conference with John Dillon.	.5
04/04/85	Receipt and review of Investigation Report from John Dillon.	1.0
04/04/85	Receipt and review of Medical Report from Doctor Silverman.	.5
04/08/85	Telephone conference with Mike Walton at Sloppy Joe's in Key West, Florida regarding Leonard Brown.	.5
04/08/85	Telephone conference with Doug Cooney regarding the Coral Agency and other Booking Agents.	.3
05/06/85	Telephone conferences to several Talent Agencies regarding Little Saints and Leonard Brown.	.6
05/16/85	Dictate letter to Mr. Evans at Crescent Moon in Fort Lauderdale regarding the whereabouts of Leonard Brown.	.3
07/15/85	Receipt and review of correspondence.	.3
08/08/85	Telephone conference to Crescent Moon Agency and Scott Evans regarding whereabouts of Leonard Brown.	.4
08/14/85	Telephone conference to Scott Evans and Crescent Moon regarding Leonard Brown.	.3
08/14/84	Telephone conference to Monroe County Sheriff's Department regarding prerequisites to obtain Jail Records. Dictate letter regarding request therefor.	.6
09/09/85	Review records received from the Monroe County Jail.	.6
04/24/86	Research Statute of Limitations.	.5

04/25/86	Research actions under 42 USC 1983 in preparation for dictating Complaint.	2.7
04/29/86	Dictate Complaint.	1.0
05/01/86	Research Respondent Superior, Local Government Liability and other issues regarding Section 1983 Liability and review and edit Complaint.	1.0
05/05/86	Final review of Complaint; Telephone conference with Clerk's Office regarding filing, service, etc.	.4
05/06/86	Dictate three (3) Summons, Civil Action Designation Form and Motion to Appoint Process Server.	.5
05/09/86	Several telehone calls to Key West, Florida to obtain the name of a potential Process Server.	.6
05/12/86	Telephone conference with Harry Sawyer regarding appointment as Process Server.	.2
05/14/86	Prepare and file Complaint with Clerk of Court together with Summons, etc.	1.0
05/14/86	Dictate letter to Harry Sawyer regarding service of process on Defendants.	.3
05/22/86	Telephone conference with Harry Sawyer regarding Martin County being on Summons instead of Monroe County.	.2
06/23/86	Review Answer received from Defendants; Research Rules with regard to Interrogatories.	.4
06/25/86	Review Return of Service on Defendants and forward to Clerk of Court.	.2

06/27/86	Research and Prepare Interrogatories to Defendants.	.6
07/09/86	Dictate Interrogatories to Defendants.	.5
07/11/86	Review Order for Pre-Trial Conference dated 07/08/86 and docket therefor.	.3
07/11/86	Review and edit Interrogatories to the various Defendants.	.2
08/07/86	Telephone conference with Client in Hong Kong regarding status of case.	.2
08/07/86	Dictate Note to File regarding Client's address and telephone number in Hong Kong.	.1
08/12/86	Telephone conference with Client regarding dates he will be available for his deposition.	.2
08/13/86	Dictate letter to Attorney Parker regarding dates Client will be available for deposition.	.3
08/13/86	Telephone conference with Attorney Parker regarding scheduling of deposition and agreement for Joint Motion to reschedule Pre-Trial Conference.	.2
08/13/86	Dictate Joint Motion and cover letter to Attorney Parker.	.4
08/15/86	Review Answers to Interrogatories received from Defendants Freeman and Cavanaugh.	.5
08/19/86	Telephone conference with Attorney Parker regarding Answers to Interrogatories received.	.2

08/19/86	Dictate letter to Attorney Parker confirming telephone conference regarding additional information to be received in Answers to Interrogatories; Dictate Request for Production.	2.0
	Review and Edit Request for Production.	.3
08/21/86	Review 08/20/86 letter received from Attorney Parker with executed copy of Joint Motion for Extension enclosed.	.2
09/02/86	Review return of original Request for Production from Clerk per Local Rule 10-I.	.2
09/11/86	Telephone conference with Judge Nesbitt's secretary regarding response to Joint Motion.	.2
09/12/86	Review message received from Judge Nesbitt's secretary regarding rescheduling of Pre-Trial Conference.	.2
10/02/86	Review Order dated 09/24/86 and docket same.	.3
10/02/86	Telephone conference with Attorney Parker's secretary regarding outstanding discovery due; Review file.	.3
10/15/86	Telephone conference with Attorney Parker regarding whereabouts of discovery owed.	.2
10/15/86	Dictate letter to Client regarding date for deposition.	.2
10/27/86	Telephone conference with Attorney Parker's Secretary, Virginia, regarding last request for compliance with discovery.	.2

10/28/86	Dictate Motion to Compel Discovery.	.4
11/04/86	Telephone conference with Client regarding dates for his deposition and status of case.	.2
11/04/86	Telephone conference with Attorney Parker regarding date for Ellis deposition and status of outstanding discovery.	.3
11/04/86	Review 10/29/86 letter received from Attorney Parker with Response to Request for Production.	.4
11/04/86	Telephone conference with TASA regarding Expert in Prison Procedures.	.3
11/06/86	Telephone conference with Doctor Baer regarding use as Expert.	.3
11/07/86	Research damages and value of case.	.8
11/10/86	Review TASA Memorandum for Colonel Lynch and Doctor Baer.	.4
11/10/86	Telephone conference with Colonel Lynch regarding case, etc.	.3
11/10/86	Review Order dated 11/07/86 and docket same.	.3
11/12/86	Review 11/10/86 letter received from Colonel Lynch with enclosures.	.5
11/18/86	Telephone conference with Attorney Parker regarding Production of Documents, Pre-Trial Conference and deposition date.	.3
11/21/86	Review copy of 11/18/86 letter to Judge Sorrentino from Attorney Parker regarding Pre-Trial.	.3
11/24/86	Review Order dated 11/20/86.	.3

11/26/86	Review Order dated 11/25/86 and docket new date for Pre-Trial Conference.	.2
12/02/86	Schedule and arrange deposition of Leonard Brown in South Carolina.	1.0
12/02/86	Dictate letter to Mr. Belk regarding service of Subpoena on Leonard Brown and Notice of Deposition De Bene Esse; Review documents produced by Defendants per 11/21/86 letter.	1.0
12/06/86	Dictate Subpoena for Deposition for Leonard Brown.	.3
12/08/86	Telephone conferences with Travel Agent (2) regarding trip to Key West to review documents requested.	.5
12/08/86	Travel to Clerk's Office for issuance of Subpoena for Deposition for Leonard Brown.	.6
12/12/86	Telephone conference with Attorney Parker regarding discovery in Key West, deposition in South Carolina and Motion for Continuance of Pre-Trial Conference.	.3
12/12/86	Dictate Motion for Continuance of Pre-Trial Conference.	.3
12/12/86	Telephone conference with Client in Hong Kong and Attorney Parker's secretary regarding deposition on 01/07/87 or 01/08/87 in West Palm Beach, Florida.	.4
12/15/86	Telephone conference with Mr. Belk regarding service on Leonard Brown.	.2
12/15/86	Review Affidavit of Service and Subpoena for Deposition.	.1

12/18/86	Travel to Key West, Florida to review documents per Request for Production.	11.5
12/19/86	Review Order dated 12/17/86.	.2
12/19/86	Office conference with Doctor Iglesias regarding Client.	.3
12/31/86	Telephone conference with L. Grump regarding travel plans for Brown deposition.	.2
12/31/86	Review Notice of Taking Deposition dated 12/19/86.	.2
12/31/86	Telephone conference to Royal Palm Reporting regarding appearance at deposition and forward copy of Notice per Attorney Parker's request.	.2
01/02/87	Telephone conference with Court Reporter in Greenville, South Carolina confirming Brown deposition.	.2
01/02/87	Telephone conference with Leonard Brown regarding deposition and dictate Note to File.	.3
01/02/87	Review letter from Client dated 12/26/86.	.2
01/02/87	Research damages for Emotional Distress and Punitive damages.	.4
01/05/87	Travel to Greenville, South Carolina; Prepare for and attend the deposition of Leo-Brown, Jr.	13.0
01/06/87	Research value of case.	.3
01/06/87	Telephone conference with Royal Palm Reporting regarding cancellation of 01/07/87 deposition.	.1

01/06/87	Telephone conference with Client regarding cancellation of his deposition and status of case.	.4
01/07/87	Telephone conference with Doctor Iglesias regarding appointment with Client.	.2
01/07/87	Office conference with Client regarding status of case.	1.0
01/07/87	Review diary of Client received during office conference.	.3
01/12/87	Review 01/08/87 letter received from Attorney Parker with enclosures.	.5
01/12/87	Dictate Pre-Trial Stipulation.	1.0
01/13/87	Telephone conference with Judge Sorrentino's clerk regarding Pre-Trial Stipulation.	.2
01/13/87	Review and edit Pre-Trial Stipulation.	.2
01/15/87	Dictate Motion to Extend Time for Discovery and Motion to Specially Set Cause for Trial.	.8
01/15/87	Telephone conference with Judge Sorrentino's secretary confirming Pre-Trial and directions thereto.	.3
01/16/87	Travel to Miami for Pre-Trial Conference and research value of case.	6.0
01/20/87	Review Order dated 01/15/87 and Report of Magistrate dated 01/16/87.	.4
01/26/87	Review and obtain issuance of Subpoena for Records Custodian of Keys Community College.	.8
01/27/87	Dictate letter to Attorney Parker with settlement demand, etc.	.4

02/06/87	Office conference with Doctor Iglesias; Review Report from Doctor Iglesias.	.5
02/06/87	Review 02/03/87 letter received from Attorney Parker.	.2
02/06/87	Dictate instructions to set up depositions in Key West, Florida.	.2
02/17/87	Review Answers to Interrogatories received from Defendant Mumford.	.2
02/17/87	Review 02/09/87 Order Setting Trial and docket same.	.2
02/18/87	Telephone conference with Court Reporter regarding 02/19/87 deposition.	.2
02/19/87	Telephone conference with Harry Sawyer regarding service of Subpoena for Deposition and pictures of cell.	.2
02/20/87	Review 02/21/87 letter received from Doctor Weisel and telephone conference with his secretary regarding error in dates and correction thereof.	.2
02/24/87	Review letter dated 02/19/87 received from Keys Community College and docket for response.	.2
02/27/87	Dictate letter to Client with Order Setting Trial enclosed.	.2
03/04/87	Prepare thirteen (13) Notices of Deposition and Subpoenas for Deposition; Dictate letter to Attorney Parker regarding appearance without subpoenas and to Harry Sawyer to serve subpoena on Patrolman Sauer.	1.8
03/05/87	Telephone conference with Harry Sawyer regarding obtaining pictures of cell.	.2

03/10/87	Review 03/05/87 letter from Attorney Parker to Judge Sorrentino and to Clerk dated same date and Notice of Filing Deposition dated 03/05/87.	.3
03/10/87	Review Motion for Summary Judgment with attached Exhibit.	1.0
03/10/87	Telephone conference with Attorney Parker regrading highlighted material in Defendant Freeman's Affidavit.	.2
03/11/87	Telephone conference with Travel Agent regarding travel to Key West for depositions.	.2
03/13/87	Review documents received from Keys Community College per subpoena.	.5
03/13/87	Dictate Response to Motion for Summary Judgment and Affidavit in opposition thereto.	2.1
03/16/87	Review and edit Response to Motion for Summary Judgment and Affidavit in support thereof.	.8
03/16/87	Dictate Request to Produce.	.2
03/17/87	Review and edit second draft of Response to Motion for Summary Judgment.	.5
03/23/87	Review 03/17/87 letter received from Attorney Parker.	.2
03/23/87	Telephone conference with Harry Sawyer regarding locating Officers Beauregard, Patrick and Amberson.	.2
03/30/87	Dictate letter to Judge Nesbitt regarding Motion to Specially Set Trial Date.	.3
03/30/87	Dictate Motion for Relief under Rule 37.	.5

04/06/87	Prepare for deposition in Key West.	1.0
04/07/87	Travel to Key West and attend depositions of Defendants, etc.	10.5
04/08/87	Attend deposition of witness in Key West and travel to West Palm Beach.	8.5
04/09/87	Review 04/06/87 letter received from Attorney Parker and his Response to Motion for Relief under Rule 37.	.4
04/12/87	Dictate letter to Officer Beauregard, Request for Production and Request for Information from the Postal Service.	.6
04/15/87	Review copy of Policy and Procedures Manual and dictate instructions to mail original back to Colonel Meggs.	.2
04/17/87	Review Return from Postmaster regarding forwarding address of Officer Beauregard.	.1
04/27/87	Review Order Specially Setting Trial Date for 06/08/87 and dictate letter to Client with regards thereto.	.3
04/27/87	Review Return of Information request on Officer Beauregard.	.1
05/05/87	Telephone conference with Client in India regarding settlement and travel plans, etc.	.2
05/05/87	Review file with regards to settlement and counteroffer; attempted telephone conference with Attorney Parker.	.2
05/11/87	Review executed Affidavit in Support of Motion for Summary Judgment received from Client and forward to Clerk and Attorney Parker.	.2

05/14/87	Dictate letter to Attorney Parker regarding settlement.	.5
05/14/87	Dictate Jury Instructions.	.4
05/14/87	Dictate Motion to Compel Production of Documents.	.3
05/18/87	Dictate Jury Instructions.	.4
05/19/87	Research Qualified Immunity, etc.	1.0
05/20/87	Review File with regard to subpoenas for Trial; Dictate Subpoenas, etc.	1.0
05/28/87	Telephone conference with Client regarding status of settlement.	.2
05/28/87	Review 05/20/87 letter received from Attorney Parker with Response to Request for Production and Response to Motion to Compel Discovery enclosed.	.6
05/28/87	Telephone call to Attorney Parker's Office regarding settlement.	.2
05/29/87	Telephone conference to Attorney Parker's Office regarding status of settlement negotiations.	.1
06/01/87	Review Order dated 05/30/87 on Motion for Summary Judgment.	.3
06/01/87	Telephone conference with Client regarding preparation for Trial.	.3
06/01/87	Dictate Jury Instructions.	.5
06/02/87	Telephone conference with Harry Sawyer in Key West regarding service of Subpoenas.	.2
06/02/87	Travel to "60 Minute Photo" to enlarge photographs of cell.	.5

06/02/87	Research and prepare for Trial.	5.0
06/03/87	Prepare for Trial	8.0
06/04/87	Office conference with Client; Prepare for Trial.	7.5
06/05/87	Prepare for Trial.	10.0
06/06/87	Prepare for Trial	13.0
06/07/87	Prepare for Trial.	16.0
06/08/87	Attendance at Trial; Preparation for 06/09/87. Two (2) Attorneys	24.0
06/09/87	Attendance at Trial; Preparation for 06/10/87. Two (2) Attorneys	17.0
06/10/87	Attendance at Trial.	8.0
06/15/87	Review Witness Fee Check received back from Doctor Ciejek and void same.	.1
06/15/87	Dictate proposed Final Judgment and cover letter to Judge Nesbitt with regard thereto.	.4
06/16/87	Telephone conference with Doctor Iglesias regarding bill for Motion to Tax Costs.	.2
06/16/87	Review 06/11/87 letter received from Keys Community College with Witness Fee Check enclosed; Void Witness Fee Check.	.2
06/16/87	Dictate letter to Client requesting list of all costs expended.	.2
06/16/87	Review Time Sheets in preparation of Attorneys' Fees Affidavit.	.5
06/18/87	Telephone conference with Mrs. Ellis regarding outcome and status of case.	.2

06/18/87	Telephone conference with reporter from Miami Herald Newspaper.	.3
06/22/87	Review 06/18/87 bill received from Doctor Iglesias.	.2
06/23/87	Review Final Judgment and docket date for Appeal on Motion to Tax Costs and Fees.	.2
07/07/87	Review Motion for Judgment in accordance with Motion for Directed Verdict.	.3
07/07/87	Review Memorandum dated 06/30/87 in support of Motion for Judgment in Accordance with Motion for Directed Verdict.	.6
07/09/87	Do research for Memorandum in Opposition to Motion for Judgment in Accordance with Motion for Directed Verdict.	1.0
07/09/87	Dictate Memorandum in Opposition to Motion for Judgment in Accordance with Motion for Directed Verdict.	.6
07/10/87	Review, edit and complete Memorandum in Opposition to Motion for Judgment in Accordance with Motion for Directed Verdict.	1.0
07/13/87	Research Rules, Civil Procedure and Appellate Rules regarding effect of filing Motion for Judgment in Accordance with Motion for Directed Verdict.	.5
07/22/87	Review 07/16/87 letter received from Client regarding Motion to Tax Costs.	.4
08/26/87	Review 08/24/87 letter received from Doctor Iglesias and telephone conference with Doctor Iglesias regarding same.	.2

10/02/87	Review Order dated 09/24/87 granting Defendant Freeman's Motion for Judgment in Accordance with Motion for Directed Verdict.	.3
10/05/87	Review 10/02/87 letter received from Associated Court Reporters and Invoice #8321.	.2
10/13/87	Review time records in preparation for Motion to Tax Fees and Costs and Affidavit in Support thereof.	.5
	Review client ledger with regard to Affidavit in support of Motion to Tax Costs.	.3
10/19/87	Research, prepare and dictate Motion to Tax Costs and Attorney Fees with supporting Affidavits.	4.6
	Review and edit Motion to Tax Costs and Fees and Affidavits in Support thereof.	.5
	Review Standards for Assessing Attorney Fees.	1.2
10/21/87	Final review and edit of Motion to Tax Costs and Fees and supporting Affidavits.	.3
	Review and edit Time Records attached as Exhibit to Affidavit in Support of Motion to Tax Fees and Costs for accuracy.	.3
	Travel to Attorney Baker's office to deliver entire file for his review as to Attorney Fees.	.7
10/22/87	Travel to Attorney Baker's office to retrieve file and receive Affidavit as to Attorney Fees.	.4
	TOTAL ATTORNEY HOURS	252.2

EXHIBIT "C"

AUTHORITY TO REPRESENT

The undersigned client hereby retains and employs Kevan K. Boyles and William McCarthy Attorneys at Law as his attorneys to represent him in a claim for damages against Monroe County and the town of Key West, Florida or any other person, firm or corporation liable therefor, resulting from Injuries that occurred on or about May 14, 1984, at Key West, FL in the Monroe County Jail.

The client hereby agrees to pay for the costs of investigation, and should it be necessary to institute suit, court costs and costs of securing evidence, including expert testimony. As compensation for their services, the client agrees to pay the attorneys, from the proceeds of any recovery, the following fee:

33 1/3% — In the event of recovery by settlement before suit is filed;

40% — In the event of recovery by settlement after suit is filed or upon suit without appeal;

45% — If an appeal is taken from the lower court by either side, or if garnishment or any other proceeding after judgment has to be brought to collect the judgment or any portion thereof.

It is agreed and understood that this employment is upon a contingent fee basis. If no recovery is made, the client will not be indebted to the attorneys for any fee, except those costs expended by the attorneys on behalf of the client.

It is agreed and understood that the attorneys may withhold and pay from the proceeds of recovery any and all costs of investigation, court costs and costs of securing evidence, including expert testimony, and, at their option, may withhold and pay from the proceeds of recovery any and all medical, hospital and other bills and charges which are unpaid or reimbursed prior to paying the balance of the recovery to the client.

It is further agreed and understood between the parties that the undersigned attorney may associate the law firm of Unknown at this time, to cooperate and participate in certain aspects of their claim at no additional cost to the client and that any attorney's fees for services provided herein shall be divided between the attorneys in direct relation to their work performed.

The client certifies that he has employed no other attorney or counsel in this matter.

/s/ Richard R. Ellis
Client

.....
Client

The above employment is hereby accepted upon the terms stated.

/s/ Kevan K. Boyles

AND

/s/ William McCarthy by
Kevan K. Boyles, Agent

DATED: 5-18-84

(Filed October 22, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86 1034 Civ Nesbitt
Florida Bar No. 185854

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD and EDWARD CAVANAUGH,
Defendants.

AFFIDAVIT OF ATTORNEY AS TO FEES

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, personally appeared MOSES BAKER, JR., who, upon being duly sworn, deposes and states as follows:

1. Affiant is an attorney and partner of the law firm of MONTGOMERY, SEARCY AND DENNEY, P.A., with its offices in West Palm Beach, Florida.

2. Affiant has practiced law in Florida in excess of ten (10) years and is admitted to the Non-Trial Bar of the United States District Court for the Southern District of Florida.

3. Affiant is familiar with civil rights litigation and more particularly with litigation with 42 USC, §1983. Affiant has personally been involved in litigation under §1983 and is currently involved in litigation under §1983. Affiant's most recent jury trial in §1983 litigation occurred in Langevin v. City of Riviera Beach, et al, which resulted in a jury verdict of $540,000.

4. Affiant has reviewed the plaintiff's entire file, including the plaintiff's attorney's daily time records.

5. Affiant is of the opinion that 251.1 attorney hours were reasonably expended in representing the plaintiff in this matter.

6. Affiant is familiar with the hourly rate normally charged in this community for representing litigants in civil rights litigation in Federal Court.

7. Affiant is of the opinion that $200.00 per hour is a reasonable basis for compensating the attorneys representing a successful litigant in civil rights' litigation.

8. Affiant is of the opinion that a reasonable fee for the services of BOYLES AND McCARTHY in representing the plaintiff in this matter should be $50,000.00 and has rendered this opinion based upon the following facts:

a. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

b. The likelihood that the acceptance of the particular employment precluded other employment by the lawyer;

c. The fee customarily charged in the locality for similar legal services;

d. The amount involved in the results obtained, the time limitations imposed by the circumstances;

e. The nature and length of the professional relationship with the client;

f. The experience, reputation and ability of the lawyer performing the services; and

g. The fact that the fee is contingent.

/s/ Moses Baker, Jr.
Moses Baker, Jr.

Sworn to and subscribed before me

/s/ Claudette F. Post
Notary Public, State of
Florida at Large

My commission expires: Oct 29, 1990.
(Seal)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Affidavit of Attorney as to Fees has been furnished by mail this 22 day of Oct, 1987, to: JULIUS PARKER, JR., ESQ., Haben, Parker, Skelding, Costigan, McVoy & Lebasky, Post Office Box 669, 318 North Monroe Street, Tallahassee, FL 32302.

/s/ Kevan K. Boyles
Kevan K. Boyles
Attorney for Plaintiff
Boyles and McCarthy
5725 Corporate Way
Suite 103
West Palm Beach, FL 33407
305/471-3446

(Filed May 14, 1986)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF FLORIDA
CIVIL DIVISION

86-1034 Civ-Nesbitt
FLORIDA BAR NO. 285854

RICHARD R. ELLIS,
Plaintiff,

vs.

WILLIAM FREEMAN, JR., HENRY L. MUMFORD,
and EDWARD CAVANAUGH,
Defendants.

COMPLAINT

1. Plaintiff, RICHARD R. ELLIS, is a citizen of the United States.

2. Defendant, WILLIAM FREEMAN, JR., is a citizen of the United States and a resident of and domiciled in the County of Monroe, State of Florida.

3. Defendant, HENRY L. MUMFORD, is a citizen of the United States and a resident of and domiciled in the County of Monroe, State of Florida.

4. Defendant, EDWARD CAVANAUGH, is a citizen of the United States and a resident of and domiciled in the County of Monroe, State of Florida.

5. This is an action to redress the deprivation of Plaintiff's rights, privileges and immunities protected by the Constitution and Laws of the United States of America and the State of Florida, particularly, but not limited

to the Fourteenth Amendment of the Constitution of the United States as provided by 42 USC Section 1983, 28 USC Section 1331 and Section 1346.

6. This is an action wherein the amount in controversy, exclusive of interest and costs, exceeds Ten Thousand Dollars ($10,000.00).

7. Defendant, WILLIAM FREEMAN, JR., at all times material hereto, was the duly elected and acting Sheriff of Monroe County and the duly appointed and acting Jailer of the Monroe County Jail in the County of Monroe, State of Florida, charged with the formulation and implementation of directives and policies complained of herein, thereby committing the acts complained of herein under the color of the laws of the County of Monroe and the State of Florida.

8. At all times material hereto, Defendants, HENRY L. MUMFORD and EDWARD CAVANAUGH, were Deputy Sheriffs of Monroe County employed by Defendant, WILLIAM FREEMAN, JR.

9. Plaintiff sues each and all Defendants in both their individual and official capacities.

10. On May 15, 1984, Plaintiff was arrested and incarcerated in the Monroe County Jail, located in Monroe County, State of Florida, and charged with the crimes of disorderly intoxication and public affray.

11. For a period of approximately five (5) hours on May 15, 1984, when Plaintiff was incarcerated in the Monroe County Jail, under the supervision and control of Defendants, HENRY L. MUMFORD and EDWARD CAVANAUGH, and other unnamed Deputy Sheriffs, Plaintiff's arms and legs were chained and shackled and his body was chained to and suspended from his cell bars in

an upside down position. The chaining caused the Plaintiff lack of sleep and prolonged physical pain and the Plaintiff was not released to respond to a call of nature although repeated demands were made therefor.

12. As a result of the chaining and shackling, Plaintiff suffered neck strain, multiple abrasions involving the elbows, wrists, knees and ankles, leaving permanent scars, a sprain to the left knee, and injury to the superficial branch of the radial nerve over the distribution of the left thumb.

13. The deprivation of Plaintiff's civil rights was due to the negligence of Defendant, WILLIAM FREEMAN, JR., in failing to provide adequate supervision and to protect Plaintiff from the acts complained of herein, which included improper training, control, discipline and management of the Deputy Sheriffs of the County of Monroe, State of Florida.

14. Plaintiff has incurred the services of BOYLES AND McCARTHY, attorneys at law, and has agreed to pay them a reasonable fee for their services.

WHEREFORE, Plaintiff demands judgment against Defendants for both compensatory and punitive damages, the cost of this action and attorney's fees pursuant to 42 USC Section 1988. Plaintiff further demands trial by jury.

/s/ Kevan K. Boyles
Kevan K. Boyles
Attorney for Plaintiff
Boyles and McCarthy
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West Palm Beach, FL 33407
(305) 471-3446

(Filed March 16, 1989)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5523

RICHARD R. ELLIS,
Plaintiff-Appellant,

versus

WILLIAM FREEMAN, JR., HENRY L. MUMFORD,
EDWARD CAVANAUGH,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Florida

ON PETITION(S) FOR REHEARING

Before KRAVITCH and HATCHETT, Circuit Judges and MARKEY,* Chief Circuit Judge.

PER CURIAM:

The petition(s for rehearing filed by appellant is DENIED.

ENTERED FOR THE COURT:

/s/ (Illegible)
United States Circuit Judge

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*Hon. Howard T. Markey, Chief U. S. Circuit Judge for the Federal Circuit, sitting by designation.

(Filed January 26, 1989)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5523

D. C. Docket No. 86-1034

RICHARD R. ELLIS,
Plaintiff-Appellant,

versus

WILLIAM FREEMAN, JR., HENRY L. MUMFORD,
EDWARD CAVANAUGH,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 26, 1989)

Before KRAVITCH and HATCHETT, Circuit Judges and MARKEY*, Chief Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

Judgment Entered: January 26, 1989

For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: MAR 29 1989

*Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

(Dated February 14, 1989)

IN THE
UNITED STATES COURT OF APPPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 88-5523

RICHARD ELLIS,
Appellant,
vs.
WILLIAM FREEMAN, et al.,
(DC No. 86-1034-Civ.-Nesbitt)
Appellees.

PETITION FOR REHEARING

Comes now the Appellant, Richard R. Ellis, and petitions the Court for rehearing pursuant to Federal Rule of Appellate Procedure 40 and as grounds therefor states the following:

1. The Court misapprehended the requirements of Rule 36 of the Federal Rules of Appellate Procedure and Eleventh Circuit R. 36-1 in affirming the judgment of the district court without opinion.

2. The Court misapprehended the precedential effect of the Magistrate's recommended findings of fact under 28 U.S.C. § 636(b)(1), which statute requires the district court to make a *de novo* determination of those

portions of the Magistrate's report to which Appellant made timely objection.

3. The Court overlooked certain requirements of the Federal Rules of Civil Procedure as they impact on the effect of Appellees' failure to respond, contradict or object to Appellant's uncontested attorneys' fee affidavits.

4. The Court overlooked Appellant's third issue on appeal, which issue went unchallenged by Appellees, and to which issue the Court directed no query and made no reference in its decision.

I

THE COURT MISAPPREHENDED THE REQUIREMENTS OF RULE 36 OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND ELEVENTH CIRCUIT R. 36-1 IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT WITHOUT OPINION.

Appellant respectfully suggests that his appeal was not appropriate for an affirmance without opinion. A Court may not affirm the judgment of a district court, without opinion, unless certain specified circumstances exist. Eleventh Circuit R. 36-1. Rule 36-1 establishes a two part test, both parts of which must be independently satisfied, before a court may issue an affirmance without opinion. Neither part is met in this action.

Rule 36-1 sets out five initial bases for an affirmance without opinion which must first apply; only two of which could have any application at bar:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous.

(e) judgment has been entered without an error of law.

An appeal must not only have satisfied one of these two categories, but it must also have met the following condition precedent:

"and an opinion would have no precedential value." Based on the findings of fact and conclusions of law at issue in this appeal, the requirements of Rule 36-1 could not have been satisfied. This result is most clearly demonstrated on the Rule 68 issue.

The facts relevant to the Rule 68 issue were not in dispute in this case. Only two relevant facts were introduced into the record by Appellees! One, counsel for Appellees made an oral offer to recommend settlement on January 16, 1987, and two, said counsel made a written offer to recommend settlement on February 3, 1987. Nothing else appears in the record; nothing else is claimed by Appellees.

The district court concluded that these two facts constituted a Rule 68 offer of judgment. Such a determination must either be a finding of fact or a conclusion of law. If it is a finding of fact, it is prima facie clearly erroneous, since there is no support in the record for that finding. The district court made its determination without reliance upon any written document whereby Appellees "offer to allow judgment be taken" against them. Absent a supportable factual finding of a written offer, the district court could not conclude a Rule 68 offer of judgment had been made. *Marek v. Chesny*, 473 U.S. 1 (1985).

If the district court's determination was a conclusion of law, it is prima facie error for the same reason. Further, such a legal conclusion would conflict directly with *Maguire v. Federal Crop Ins. Corp.*, 181 F.2d 320

(5th Cir 1950) which expressly found that "an offer of compromise is not an offer of judgment." This decision of the Fifth Circuit, decided prior to the creation of the Eleventh Circuit, should control this appeal. This Fifth Circuit decision dispositively demonstrates the District Court's error of law.

The second prong of the Rule 36-1 test was equally unmet. This Court presumably determined that an oral and a written offer to recommend settlement constitutes a valued Rule 68 offer of judgment. If this conclusion had been stated in a written opinion, it would have great precedential value.

Under United States Supreme Court precedent, a Rule 68 offer of judgment required a appellee to offer, in writing, that a judgment be taken against him. *Marek v. Chesny*, 473 U.S. 1 (1985). After this Court's affirmance, a mere recommendation of settlement by appellee's counsel is enough to trigger the harsh penalty limitations of Rule 68. Such a material change in the law will have a great impact on the members of the bar practicing within the Eleventh Circuit and before the district court judge.

The Court's affirmance of Judge Nesbitt's Rule 68 interpretation adds a new "spirit and intent" exception to Rule 68. This exception, as a departure from present law, should be fully announced to the practitioners before this Court and the district court so that they may avoid the surprise application of this exception to their actions. Unfortunately, Appellant had no such prior announcement of this new exception, relying instead on the Supreme Court's recitement of the Rule 68 requirements in *Marek*. Appellant's apparently unreasonable reliance has cost him $4,122.56 in assessable court costs and in excess of 162 hours

of attorney time properly incurred by him after the date the "spirit and intent" offer of judgment was made. (R2-63-1) (R2-68-1).

Appellant has learned the hard way that Rule 68, contrary to its title and unambiguous terms, no longer requires an offer of judgment. Appellant believes its lesson has far reaching precedential value and merits as opinion from this Court so that no one else will unwittingly fall victim to an offer to recommend settlement.

II

THE COURT MISAPPREHENDED THE PRECEDENTIAL EFFECT OF THE MAGISTRATE'S RECOMMENDED FINDINGS OF FACT UNDER 28 U.S.C. § 636 (b)(1), WHICH STATUTE REQUIRES THE DISTRICT COURT TO MAKE A *DE NOVO* DETERMINATION OF THOSE PORTIONS OF THE MAGISTRATE'S REPORT TO WHICH APPELLANT MADE TIMELY OBJECTION.

Appellant respectfully suggests the Court may have misapprehended the status of this action before the district court. Judge Hatchett, at oral argument, questioned Appellant as to whether the Magistrate had not made a finding of fact that a true Rule 68 offer of judgment had been made orally at a pre-trial conference, which finding of fact Appellant had the burden to prove clearly erroneous.[1] If this question served as a basis for affirmance, Appellant believes the Court may have misapprehended the legal effect of the Magistrate's recommended conclusion on this point.

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1. Appellant would note this issue was not raised by Appellees and accordingly Appellants had no previous opportunity to fully address this argument.

Judge Nesbitt referred Appellant's costs and fee application to the Magistrate under 28 U.S.C. 636(b) for proposed findings of fact and recommendations. (R2-67-1). Section 636(b) requires that the district court judge make a *de novo* determination of those portions of the Magistrate's proposed recommendations to which objection is made.

> The magistrate may do no more than propose a recommendation, and neither § 636(b) nor the General Order gives such recommendation presumptive weight . . . The authority. . . and the responsibility. . . to make an informed, final determination, we emphasize, remain with the judge.

Mathews v. Weber, 423 U.S. 261, 270-71, (1976). Once an objection is made, the district court must review the actual evidence presented to the Magistrate and make its own findings of fact. It is therefore the district court's finding, and not the Magistrate's which must be reviewed on appeal:

> An appellate court must be satisfied that a district judge has exercised his non-delegable authority by considering the actual testimony, and not merely by reviewing the magistrates report and recommendation.

U.S. v. Elsoffer, 644 F. 2d 357, 359 (5th Cir. 1981).

Accordingly, the Magistrate's findings on this point have no bearings on this appeal. Appellant objected to the Magistrate's report. With Appellant's objection only Judge Nesbitt's finding from the record presented is reviewable. Judge Nesbitt's finding is clearly erroneous. The only evidence in the record before Judge Nesbitt was presented by the affidavits of the parties. The only evi-

dence relative to the Rule 68 issue was presented in the affidavit of Julius F. Parker, Jr. (R2-64-6). Julius Parker's affidavit does not present a single shred of evidence to support a finding of fact by Judge Nesbitt that a Rule 68 offer of judgment had been made to Appellant.[2] Whether or not the Magistrate could have made such a finding in her recommendation, such a *de novo* finding by Judge Nesbitt is clearly erroneous. There is nothing in the record before this Court would could support the non-delegable conclusion of Judge Nesbitt that an offer of judgment had been made. Appellant sustained his burden on appeal and merited a reversal of the District Court.

III

THE COURT OVERLOOKED CERTAIN REQUIREMENTS OF THE FEDERAL RULES OF CIVIL PROCEDURE AS THEY IMPACT ON THE EFFECT OF APPELLEES' FAILURE TO RESPOND, CONTRADICT OR OBJECT TO APPELLANT'S UNCONTESTED ATTORNEYS' FEE AFFIDAVITS.

The Court, at oral argument, questioned Appellant as to its legal support for point II on appeal relative to the error of the District Court in ignoring Appellant's unopposed, unobjected to fee affidavits.[3]

While Appellant continues to maintain that the only case law on point supports its position on appeal, *Cunning-*

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2. Aside from Parker's affidavit, what may or may not have occurred at a pre-trial conference could not have been reviewed by Judge Nesbitt as no such evidence was presented by the parties aside from Parker's affidavits.

3. Appellees chose not to brief this issue on appeal and filed no response to Appellant's argument. Since Appellees did not choose to contest their point on appeal, Appellant did not have an opportunity to anticipate and fully respond to the points which the Court raised at oral argument.

ham v. City of McKeesport, 753 F.2d 262 (3d Cir. 1985), *vacated*, ... U.S. ....., 106 S.Ct. 3324 (1986), *reinstated*, 807 F.2d 49 (3d Cir. 1986), *cert. denied*, ... U.S. ....., 107 S.Ct. 2189 (1987), Appellant believes the Court may have overlooked certain other legal support for Appellant's position.

Appellant would cite the Court two other applicable situations where an appellee's failure to respond to a appellant's factual presentation requires a finding for appellant, Rule 8(d), Fed. R. Civ. P., Rule 56(e), Fed. R. Civ. P.

Rule 8(d) sets forth the effect of a failure by a appellee to deny a factual allegation in a pleading. It states:

> Averments in a pleading to which a responsive pleading is required, other than those as to amount of damage, are admitted when not denied in the responsive pleading.

Rule 56(e) sets forth the effect of a failure by a appellee to respond to factual allegations in a summary judgment motion. It states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Both of these rules support the decision reached by the Third Circuit in *Cunningham* as applied to the case at bar; if a appellee does not create a genuine issue of fact by response or denial, then the appellee has admitted the facts presented and no issue remains to be decided by the Court.

This result effectuates two essential policies inherent in the creation of these rules. First, fundamental fairness prohibits adjudication in favor of an appellee on factual issues that it does not contest and on which it did not afford the appellant an opportunity to respond; second, judicial economy requires the summary resolution of factual issues which are not disputed by an Appellee, as the trial of such matters has no necessity or value.

Our legal system is based on an adversarial model. The appellant has the initial burden to allege facts. The appellee then has the burden to determine the facts with which it agrees and those which it disputes. The court holds a trial only on the facts disputed by the appellee. The Court must resolve the disputed facts, and then apply the agreed facts and resolved disputed facts to the applicable law.

At bar, Appellant presented the facts in its attorneys' fee affidavits. Appellees did not dispute or contest these initial fee affidavits. Appellant presented a supplemental fee affidavit. Appellees did not dispute or contest this supplemental fee affidavit. Under our legal system, inquiry as to these fee affidavits should have ended. The Court should have accepted these facts and applied them to the applicable law. While certain aspects of an appropriate attorneys' fee were still at issue (eg. appropriateness of lodestar reduction, if any, based

on results obtained), the facts established by Appellant's fee affidavits were not. These facts should have been accepted by the Court in its lodestar determination.

Not only did Appellees not contest this issue at the trial level, Appellees did not dispute Appellant's fee affidavit argument on appeal. Appellees did not cite a single legal decision contrary to Appellant's legal support. Appellees did not write a single word addressed to this issue. Yet Appellees prevailed in this Court without an opinion. Such a result is fundamentally unfair and logically unfathomable.

The Court questioned Appellant as to the myriad of cases in the Eleventh Circuit where the Trial Court properly reviewed the contested attorneys' fee affidavits. Counsel responded that he could find no such cases which dealt with the factual situation at bar in which the appellees did not contest the fee affidavits. Appellant can still find no such case. Certainly, Appellees did not cite any such case, nor does the Court cite any such case in its opinion. Given the *Cunningham* decision directly on point, together with the analogous Rule 8 and Rule 56 precedents, Appellant believes a rehearing is merited on this issue.

IV

THE COURT OVERLOOKED APPELLANT'S THIRD ISSUE ON APPEAL, WHICH ISSUE WENT UNCHALLENGED BY APPELLEES, AND TO WHICH ISSUE THE COURT DIRECTED NO QUERY AND MADE NO REFERENCE IN ITS DECISION.

Appellants believe the Court may have inadvertently overlooked its third issue on appeal; that the District

court erroneously reduced the lodestar fee award contrary to established law. Appellees did not address a single word of its brief to this issue, except for raising, for the first time, an issue with respect to Appellant's contingency fee contract. At oral argument, Appellees presented no argument against Appellant's point on appeal. Similarly, the Court did not address any questions to this issue, nor did it refer to this issue in its opinion.

Appellant thoroughly briefed this issue and believes it presented the correct legal support and met its burden of going forward on this issue. Since Appellees chose, as above, not to contest this point on appeal, Appellant can see no basis for a ruling favorable to Appellees. Appellant believes it merits a rehearing on this issue.

CONCLUSION

Appellant respectfully requests the Court rehear its appeal and reverse the District Court's order.

Respectfully submitted,

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& Gerson, P.A.
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West Palm Beach, Florida 33401
Telephone: (407) 686-3307
Attorneys for Appellant

By: /s/ Phillip C. Gildan
Phillip C. Gildan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing instrument has been furnished by mail to JULIUS F. PARKER, JR., ESQUIRE, Haber, Parker, Skelding, Costigan, McVay & Labasky, 318 North Monroe Street, Tallahassee, Florida 32302, this 14th day of February, 1989.

/s/ Phillip C. Gildan
Attorney